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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 264

**GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER,**

vs.

GRACE W. YORK

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 17, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

GRACE W. YORK,

Plaintiff-Appellant,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,

A CORPORATION,

Defendant-Appellee.

Statement Under Rule XIII.

This action was commenced by the serving and filing of a summons and complaint on the 22nd day of January, 1942. The defendant on July 9, 1943, moved for a summary judgment in its favor, supported by affidavits and exhibits. The plaintiff filed a counter motion for a summary judgment in her favor. The matter was argued orally and written briefs were submitted. On October 7, 1943, Judge Simon H. Rifkind rendered his opinion granting defendant's motion, and denying plaintiff's motion, and on October 22, 1943, judgment was entered in said defendant's favor and against the plaintiff, from which this appeal is prosecuted by the said plaintiff. Notice of Appeal was filed on November 5, 1943.

Complaint.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK.****Civil Action No. 17-165.****GRACE W. YORK,****Plaintiff,****vs.****GUARANTY TRUST COMPANY OF NEW YORK,
a corporation,****Defendant.**

Plaintiff, Grace W. York, in her own right and for the use and benefit of the entire class of the noteholders aggregating \$1,213,000 of a note issue of \$30,000,000, complains of the defendant, Guaranty Trust Company of New York, a corporation, and says:

1. Plaintiff is a citizen and resident of the State of Pennsylvania, having her place of residence in the City of Allentown, Pennsylvania, and the defendant, Guaranty Trust Company of New York, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and the federal jurisdiction is founded on the diversity of citizenship.

2. Plaintiff is the owner of \$6,000 in notes of a \$30,000,000 note issue hereinafter described, of which there are now outstanding \$1,213,000 in principal amount of notes, and on which there is due interest at 6% from November 1, 1932 to date.

Complaint.

3. These notes are part of a series of a note issue of \$30,000,000 executed by Van Sweringen Corporation, (hereinafter called "Company"), wherein the defendant, Guaranty Trust Company of New York, was named as Trustee under a trust indenture which was executed by the Company on May 1, 1930, securing the series of notes in the aggregate amount of \$30,000,000, bearing interest at 6% per annum payable semi-annually, the principal amount being due and payable on May 1, 1935.

4. The trust indenture securing the \$30,000,000 note issued provided, among other things, that the Company would maintain in its treasury "segregated assets" to the extent of 50% of the principal amount of the outstanding notes until the note issue will be reduced to \$15,000,000. The principal officers of the Company, O. P. and M. J. Van Sweringen, agreed, as part consideration for the sale of the notes to the public, to enter into an agreement with the Guaranty Trust Company for the exclusive use and benefit of the noteholders, to keep the "segregated assets" in liquid market condition so that their market would always remain 50% of the amount of the outstanding notes, and in the event of a decrease in their market value, to supply additional securities to make up such deficiency, which securities were to be designated as "assigned securities". These "assigned securities" were to be supplied within 20 days from the date when any deficiency occurred.

5. Simultaneously with the execution of the trust indenture and with the execution of the notes secured thereby, the said principal officers of the Company entered into the agreement with the Guaranty Trust Company of New York, the Trustee, which agreement was dated May 1, 1930. The agreement provided, among other things:

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Complaint.

(a) Van Sweringens agreed to repair any deficiency in the "segregated assets" by supplying "assigned securities" making up such deficiency.

(b) The "assigned securities" were to be held in the corporate treasury and were available to its creditors, subject to certain conditions enumerated in the agreement.

(c) In the event of a default under the terms of the agreement, the Guaranty Trust Company, as Trustee, was authorized to institute appropriate proceedings for the enforcement of the terms.

(d) The agreement was made for the exclusive benefit of the holders of the \$30,000,000 in notes, as it more fully appears from a copy of the agreement which is attached hereto as Exhibit "A" and made a part hereof.

6. The trust indenture referred to the terms of the agreement and provided that the exclusive right of action was vested in the Trustee. It further provided that it was discretionary with the Trustee to accelerate the note issue upon default in the payment of interest, and upon demand in writing of at least 25% of the outstanding notes, the Trustee was bound to accelerate the note issue and to take the appropriate action. Some excerpts of the trust agreement are hereto attached as Exhibit "B" and made a part hereof.

7. On or about October 29, 1931, there were outstanding notes in the hands of the public amounting to \$26,246,000. The interest thereon was due November 1, 1931, and the Company had no funds to meet the interest payments. There was sufficient cash in the "assigned securities" to pay 50% of the outstanding notes. In the event

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of the failure to pay the interest, the Trustee was authorized to enforce the terms of the agreement, to accelerate the note issue and to apply the "assigned securities" in payment of 50% of the note issue, and to obtain a deficiency for the balance, and to collect that balance from the remaining assets of the Company which consisted of an investment in the Cleveland Terminals Building Company, (hereinafter called "Terminals Company"), its wholly owned subsidiary, in excess of \$29,000,000, and in a claim on an open account due to the Company from its subsidiary in the sum of \$27,154,584.03.

8. The defendant, Guaranty Trust Company of New York, the Trustee of the note issue, was then a creditor of the Terminals Company as participant in a loan of \$39,500,000 made October 30, 1930, wherein said Trustee, together with J. P. Morgan, loaned to the extent of \$22,000,000, each one contributing \$11,000,000, which loan was evidenced by a note of the Terminals Company in the amount of \$23,500,000, secured by all of the securities of the Terminals Company, and another note of \$16,000,000 executed by the Vaness Company, the parent of the Van Sweringen Corporation, and among the securities for that note was all of the common stock of the Van Sweringen Corporation.

9. The interest on both notes was due November 1, 1931, and neither the Vaness Company nor the Terminals Company, nor any of its officers were in a position to meet these payments.

10. The Guaranty Trust Company, the Trustee of the \$30,000,000 note issue, was interested in the \$30,000,000 note issue, not only as Trustee, but as the parent of the Guaranty Company, its wholly owned subsidiary, which

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participated in the syndicate which sold the \$30,000,000 note issue to the public.

11. Faced with a situation which threatened a default in the \$30,000,000 note issue which was sold to the public by the subsidiary of the Trustee, a default in the \$23,500,000 note of the Terminals Company and in the \$16,000,000 note of the Vaness, the parent of the Van Sweringen Corporation, and to avoid bankruptcy proceedings against all of these corporations, the defendant, Guaranty Trust Company of New York, through its agency, J. P. Morgan & Company, and through its officers, devised a plan to prevent such proceedings and to eliminate all creditors who would press payment from such companies, and for such purpose they agreed to the following:

(a) To procure the exchange of the \$30,000,000 notes for common stock which was held as security for the debt of Vaness.

(b) To use the "assigned securities" for the purpose of acquiring one-half of the notes which were to be cancelled, thereby freeing the balance of the "assigned securities", and in order to meet the interest payment that was due November 1, 1931, and to use the balance after the application of a part thereof in purchase of the outstanding notes as security for their outstanding loans.

(c) To prevent any other creditor from enforcing collection against the Terminals on the open account in excess of \$27,000,000 due to the Van Sweringen Corporation from the Terminals Company, and to enable the Guaranty Trust Company and the other bankers to be the only substantial creditors against the Terminals Company.

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(d) To deprive the noteholders who would not consent to the foregoing terms from participation in any of the "assigned securities" and from the enforcement of their claims against any of the other assets.

12. To accomplish the foregoing a secret agreement was entered into with the knowledge, consent and approval of the Guaranty Trust Company of New York, dated October 29, 1931, which provided in substance as follows:

(a) That a public offer would be made in the name of the Van Sweringen Corporation to purchase the outstanding notes by paying therefor 50% in cash out of the "assigned securities" and the balance of the 50% to be paid in common stock of the Van Sweringen Corporation.

(b) One-half of the notes were to be cancelled and thereby the remainder of the "assigned securities" would be turned over as collateral on the notes held by Morgan.

(c) The other half of the notes would remain as an obligation of the Van Sweringen Corporation and would be substituted as collateral security with Morgan in lieu of the common stock.

(d) The balance remaining in the "assigned securities" was to be turned over to Morgan to be applied on account of the outstanding notes.

(e) The form of the offer to be submitted was made a part of the agreement.

(f) A copy of the agreement and offer is hereto attached as Exhibit "C" and made a part hereof.

13. This offer was submitted to all noteholders in the form as set forth in Exhibit "D" hereto attached. The

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facts that the Trustee was a creditor of the Terminals Company and of the Vaness, that the common stock was held by them as security, and that they would get the uncanceled notes in lieu of the stock as security were not revealed to the noteholders, nor were any of the other facts enumerated in paragraphs 9, 10, 11 and 12 disclosed, but such facts were concealed from the noteholders.

14. As a result of the foregoing offer \$15,000,000 of the notes were cancelled, \$13,787,000 of the notes were acquired by the Guaranty Trust Company and Morgan as substituted security in lieu of the common stock, which notes, together with other collateral, were later sold by them at a public sale on September 30, 1935, and the proceeds applied against the collateral notes. The common stock which was given to the noteholders was worthless and known to be worthless to the Guaranty Trust Company of New York at the date when the offer was made. As a further result of the foregoing offer and acceptance, the noteholders who accepted the offer were eliminated as creditors of the Van Sweringen Corporation excepting \$1,213,000 in notes, which noteholders refused to accept the offer, but they were in no position to take any action due to the fact that the exclusive right of action was vested in the Trustee, and they had no right to demand any action as they lacked the requisite 25% of the outstanding notes. The Guaranty Trust Company of New York and J. P. Morgan & Company and the other bankers who participated in the foregoing \$39,500,000 loan remained as the only creditors who could enforce payment against the Terminals Company, and were the only creditors who had the required amount to enforce payment against the Van Sweringen Corporation.

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15. Plaintiff is the owner of notes Nos. M-14424, M-25385, M-10728, M-10729, M-10732, and M-10733 aggregating \$6,000, which are part of the \$1,213,000 in notes now outstanding and which are in default, the last interest having been paid thereon on November 1, 1932. The \$13,787,000 in notes which were sold by Morgan to Midamerica were declared by a court of competent jurisdiction uncollectible for the reason that the purchase by Midamerica at the Morgan sale was fraudulent, so that the \$1,213,000 are the only creditors who are entitled to participate in the "assigned securities".

16. As a result of the foregoing scheme, the Guaranty Trust Company of New York, as Trustee, together with J. P. Morgan & Co. and the other bankers, received out of the "assigned securities" \$1,245,279.98, which they applied towards the payment of the foregoing collateral notes, and they diverted the payment of \$553,860 to the Vaness Company in purchasing subordinated notes of the Van Sweringens, and applied the further sum of \$65,779.21 in furnishing the funds to the Vaness Company to purchase another claim for Morgan so that as a result of the offer the Trustee was party to an arrangement whereby in excess of \$1,213,000 was directly diverted from the "assigned securities" to its personal benefit.

17. It was the duty of the Guaranty Trust Company of New York, as Trustee, to protect the "assigned securities" which were given for the exclusive benefit of all noteholders under the terms of the agreement, and when the interest was not available it was its duty to exercise its discretionary power to accelerate the note issue and to apply all of the "assigned securities" in payment of 50% of the note issue and obtain a deficiency decree in

Complaint.

excess of \$15,000,000 for the balance of the debt and to enforce that deficiency against the assets of the Van Sweringen Corporation, which consisted of over \$29,000,000 in capital investment in the Terminals Company and of an open account against it in excess of \$27,000,000. No bankruptcy could have been commenced against the Van Sweringen Corporation as there were no other existing creditors who could maintain any bankruptcy proceeding, and the Trustee could appropriate all of the "assigned securities" for the exclusive benefit of the noteholders who were the only existing creditors. The Trustee failed to perform its duty because of its adverse interest as creditor of the Terminals Company and as the parent of the subsidiary which participated in the sale of the \$30,000,000 note issue in the manner and form as above stated.

18. Because of the adverse position of the Trustee it actively participated in the offer whereby the "assigned securities" and other available assets were taken away from the plaintiff, as well as the other outstanding notes in the total sum of \$1,213,000, and were appropriated for its personal use and benefit in the manner and form as above stated.

19. Due to its adverse position it was the duty of the Trustee to reveal all of the information and all of the facts as set forth above, which it failed to do, and the only information that was given to the noteholders were the facts contained in the foregoing "offer" attached hereto as Exhibit "D", and by such means the outstanding \$1,213,000 in notes were in no position to make a demand upon the Trustee to take any action nor were any of the facts made known to them until this day.

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20. Plaintiff had no knowledge of the facts, and some of the facts pertaining to the participation of Morgan in the above transactions were made known to her in the middle of the year 1940, at which time she joined in a Complaint filed by one Elias Hackner against J. P. Morgan & Company and Guaranty Trust Company, as note-holders who accepted the offer and received the worthless stock in lieu of the notes. The Court, however, held that this plaintiff was improperly joined in that proceeding*, and she was dismissed out from that proceeding because of misjoinder. She learned the additional facts pertaining to the active participation of the Guaranty Trust Company in the "offer" whereby the "segregated assets" and "assigned securities" were taken away and that it participated in the entire plan for the purpose of avoiding bankruptcy proceedings in which all note-holders would have participated equally from the affidavits which were filed in the Hackner proceedings, on behalf of the Guaranty Trust Company, in December, 1941.

21. The Van Sweringen Corporation is wholly insolvent and no substantial recovery can be had against it, and the plaintiff and the other noteholders stand to lose the entire face value of the outstanding notes.

22. Plaintiff, therefore, brings this action in her own right and for the common use and benefit of the entire class of the \$1,213,000 notes and interest due thereon from November 1, 1932. The interest of the plaintiff as beneficiary under the trust indenture is identical and in common with the interest of all other beneficiaries under the trust agreement who are holders of the outstanding notes

* See *Hackner v. J. P. Morgan, et al.*, 117 F. (2) 95.

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in the aggregate amount of \$1,213,000. All of such note-holders are jointly and commonly interested in the proceeds received by the defendant, the Trustee of the bond issue, and appropriated to its personal use and benefit out of "assigned securities". They are also jointly and commonly interested in the cause of action against the defendant, as Trustee of the note issue, for the breach of faith and infidelity. The noteholders are widely scattered and it would be too expensive to join them as parties, and the plaintiff, therefore, files this suit for their joint benefit as a class suit.

Wherefore, plaintiff prays the following relief:

(a) That the Court may find and determine that the Guaranty Trust Company of New York, the Trustee of the note issue, breached its trust duties and obligations to the entire class of the \$1,213,000 outstanding notes, and that it is liable to them for the breach of its trust duties and obligations, in such amount or amounts as this Court may find due to them upon a proper accounting.

(b) That the Court may find and determine that because of the participation of the Trustee of the note issue in the fraudulent offer whereby the "assigned securities" were misappropriated to the personal use of this defendant, that it is liable on account of the outstanding notes for principal and interest in the full amount of \$1,213,000 plus interest at 6% from November 1, 1932, or

(c) In the alternative, that the defendant be held liable to the extent of the benefits it received out of the application and diversion of the "segregated assets" and "assigned securities" in such amount or amounts as the Court may find due from it upon a proper accounting.

Exhibits Attached to Complaint.

(d) That the Court may grant such other relief in the premises as to equity may seem meet.

Meyer Abrams and Bennett I. Schlessel,
Attorneys for Plaintiff.

Shulman, Shulman and Abrams,
134 North LaSalle Street,
Chicago, Illinois,

Bennett I. Schlessel,
1450 Broadway,
New York, N. Y.,
Attorneys for Plaintiff.

Exhibits Attached to Complaint.

Exhibit "A" attached to the complaint is a copy of an agreement which appears at pages 105-111 of the printed record hereinafter referred to.

Exhibit "B" consists of excerpts from the Trust Indenture which appears at pages 75-90 of the said printed record.

Exhibit "C" is a copy of the agreement which appears at pages 119-126 of the aforementioned record, having attached thereto (as Exhibit "A") the offer which appears at pages 70-73 of the said printed record as Defendant's Exhibit 4 for identification.

Defendant's Notice of Motion for Summary Judgment.

[SAME TITLE]

Sirs:

Please take notice that upon the summons and complaint herein, the annexed stipulation of facts dated July 9, 1943, the annexed affidavit of Frederick A. O. Schwarz sworn to July 9, 1943, and the following papers filed in the action in this Court entitled "Elias Hackner et al., Plaintiffs, against J. P. Morgan et al., Defendants" (Civil Action No. 8-344): (1) the complaint as amended after giving effect to an order dated June 11, 1941, eliminating certain allegations; (2) the affidavits of George Whitney sworn to December 17, 1941, and of Alfred Shriver and Arthur E. Burke, both sworn to December 18, 1941, together with the exhibits annexed thereto; (3) Exhibits 2 and 4 for identification annexed to the deposition of Eunice E. Eastman; (4) Exhibit E annexed to plaintiff's request for admissions; and all the proceedings heretofore had herein and in the aforesaid action, the undersigned will move under Rule 56 of the Rules of Civil Procedure on a day for the hearing of motions at the United States Court House, Foley Square, New York, N. Y., July 20, 1943, at 10:30 A.M., or as soon thereafter as counsel can be heard for summary judgment in favor of the defendant Guaranty Trust Company of New York against the plaintiff Grace W. York, together with the costs and disbursements of the

Defendant's Notice of Motion for Summary Judgment.

action; and for such other and further relief as may be just and proper.

Dated: New York, N. Y., July 9, 1943.

Yours, etc.

Davis Polk Wardwell Gardiner & Reed,
Attorneys for Defendant.

Office and Post Office Address:
No. 15 Broad Street,
New York, N. Y.

To:

Bennett I. Schlessel, Esq.,
and

Messrs. Shulman, Shulman & Abrams,
Attorneys for Plaintiff.

1450 Broadway,
New York, N. Y.

Stipulation of Facts Attached to Notice.

[SAME TITLE]

It is hereby stipulated by the respective parties hereto; as follows:

1. This action was commenced on January 22, 1942.

2. The notes of Van Sweringen Corporation numbered M-14424, M-25385, M-10728, M-10729, M-10732 and M-10733, referred to in paragraph 15 of the complaint herein, were originally acquired by the firm of Warren W. York & Company. On April 19, 1934, the plaintiff received said notes as a gift and she has been the owner and holder thereof since that date.

3. That the printed record filed in the United States Circuit Court of Appeals for the 2nd Circuit in the appeal from Civil Action File No. 8-344 be filed and considered as part of the record in this cause for the convenience of the parties and the court.

4. That this court may consider, in connection with any pleadings to be filed by the respective parties, the following matters which appear in said printed record:

(a) Complaint as amended, after giving effect to the Order dated June 11, 1941, eliminating certain allegations (pp. 3-10).

(b) Affidavits of George Whitney and Alfred Shriver, with exhibits attached to the respective affidavits (pp. 15-46, 75-126).

(c) Affidavit of Arthur E. Burke (pp. 47-49).

(d) Exhibits 2 to 4 for identification (pp. 61-73).

Stipulation of Facts Attached to Notice.

(e) Exhibit E (pp. 127-128).

5. That the facts set forth in the affidavits are true and that the exhibits are true and correct.

Bennett I. Schlessel,
Meyer Abrams,
Attorneys for Plaintiff.

Davis Polk Wardwell Gardiner & Reed,
Attorneys for Defendant.

Dated: July 9, 1943.

Affidavit of Frederick A. O. Schwarz Attached to Notice.

[SAME TITLE]

State of New York.

County of New York—ss.:

Frederick A. O. Schwarz, being duly sworn, deposes and says:

I am a member of the firm of Davis Polk Wardwell Sunderland & Kiendl, formerly Davis Polk Wardwell Gardiner & Reed.

On September 30, 1935 I attended the public auction of the collateral securing the loans made by the banking group to The Vaness Company and the Cleveland Terminals Building Company, which is referred to in the affidavits of George Whitney and Alfred Shriver, sworn to December 17, 1941 and December 18, 1941 respectively, in the action in this Court entitled, "Elias Hackner, et al., Plaintiffs, against J. P. Morgan, et al., Defendants." (Civil Action No. 8,344).

I represented the banking group at the auction sale and personally participated in the bidding. The collateral securing The Vaness Company loan was divided into two groups. The following collateral comprised Parcels 1 through 28 in Group No. 1:

Parcel
No.

1-6	629,132 shares Alleghany Corporation Common Stock
7	6,915 shares Alleghany Corporation Pre- ferred Stock

Affidavit of Frederick A. O. Schwarz Attached to Notice.

- | | | |
|------|------------------|---|
| 8-11 | 40,393 shares | Cleveland Railway Company Capital Stock |
| 12 | 250 shares | Huron Fourth Company Capital Stock |
| 13 | 196 shares | Long Lake Company Capital Stock |
| 14 | 17,000 shares | Terminal Building Company Capital Stock |
| 15 | 122,000 shares | Van Sweringen Company Common Stock |
| 16 | 1,244,580 shares | Van Sweringen Corporation Common Stock |
| 17 | \$139,000.00 | principal amount Alleghany Corporation 5% Bonds of 1950. |
| 18 | \$270,000.00 | principal amount Cleveland Terminals Building Company 2nd Mortgage 6% Bonds due 5/1/35. |
| 19 | \$817,460.36 | principal amount Long Lake Company 6% Demand Notes |
| 20 | \$278,204.84 | principal amount Metropolitan Utilities, Inc. 6% Demand Notes. |
| 21 | \$207,176.60 | principal amount Terminal Building Company 6% Demand Notes |
| 22 | \$170,430.29 | principal amount Terminal Hotel Company 6% Demand Notes |
| 23 | \$6,261,697.59 | principal amount Van Sweringen Company 6% Demand Notes |
| 24 | \$13,787,000.00 | principal amount Van Sweringen Corporation 5-year 6% Notes due 5/1/35 |
| 25 | \$554,103.00 | principal amount Van Sweringen Corporation 6% Demand Notes |

Affidavit of Frederick A. O. Schwarz Attached to Notice.

- 26 \$2,595,398.85 principal amount Van Sweringen Corporation 6% subordinated Note due 5/1/35
- 27 \$1,292,534.72 principal amount Higbee Company subordinated 6% Note due 3/1/34
- 28 \$69,673.71 principal amount Higbee Company Note due 3/1/34

The following protective bids were made by me:

Parcel

- 1 \$50,000 for 100,000 shs. Alleghany Corporation Common Stock
- 2 \$40,000 for 100,000 shs. Alleghany Corporation Common Stock
- 3 \$30,000 for 100,000 shs. Alleghany Corporation Common Stock
- 4 \$20,000 for 100,000 shs. Alleghany Corporation Common Stock
- 5 \$10,000 for 100,000 shs. Alleghany Corporation Common Stock
- 6 \$12,914 for 129,132 shs. Alleghany Corporation Common Stock
- 7 \$28,933 for 6,915 shs. Alleghany Corporation Preferred Stock
- 8 59 $\frac{7}{8}$ per share for 10,000 shs. Cleveland Railway Company Capital Stock
- 9 59 $\frac{7}{8}$ per share for 10,000 shs. Cleveland Railway Company Capital Stock
- 10 59 $\frac{7}{8}$ per share for 10,000 shs. Cleveland Railway Company Capital Stock
- 11 59 $\frac{7}{8}$ per share for 10,393 shs. Cleveland Railway Company Capital Stock

Affidavit of Frederick A. O. Schwarz Attached to Notice.

17 \$29,885 for \$139,000 principal amount of Alleghany Corporation 5% Bonds of 1950

19 \$25,000 for \$817,460.36 principal amount of Long Lake Company 6% Demand Notes

27 \$83,330 for \$1,292,534.72 principal amount of Higbee Company 6% Note due March 1, 1934

28 \$52,256 for \$69,673.71 principal amount of Higbee Company Note due March 1, 1934

At the direction of the New York banking group I made no protective bid on the \$13,787,000 principal amount of Van Sweringen Corporation 5-year 6% notes due May 1, 1935 (Parcel 24), referred to in the complaint herein, or on any of the other securities contained in Group 1 except those listed above. Mid-America Corporation made a bid of \$1,250 on the 250 shares of Huron Fourth Company Capital Stock (Parcel 12). No bids were made by Mid-America Corporation or any other person on the said Van Sweringen Corporation notes or on any of the other securities in Group 1 except a bid made by D. H. Silberberg & Co. of \$20,000 on the Alleghany Corporation 5% Bonds of 1950 (Parcel 17). The total of the highest bids on Parcels 1 through 28 in Group 1 was \$2,802,101.86. Mid-America Corporation then bid \$2,803,000 on said parcels as a group. There being no other bids on Group 1, the securities were sold to Mid-America Corporation as a group at that price.

Frederick A. O. Schwarz

Sworn to before me this 9th day of July, 1943.

William H. Bruder

Notary Public, New York County
No. 326, New York County Register's No. 4B289. Commission expires March 30, 1944.

(Seal)

Plaintiff's Motion for a Summary Judgment.

[SAME TITLE]

To: Davis Polk Wardwell Gardiner & Reed
Attorneys for Defendant
15 Broad Street
New York City, N. Y.

Please Take Notice that plaintiff moves for a summary judgment based on the same documents mentioned in Defendant's motion for a summary judgment; and on the Stipulation of Facts attached thereto, and that this motion will be presented to the Court simultaneously with Defendant's motion, as Plaintiff's Counter Motion for the following relief:

1. That a summary judgment be entered for the Plaintiff for the common use and benefit of the holders of \$1,213,000.00 of the notes described in the complaint, in the amount of \$606,500.00, or in the first alternative:

2. That a judgment be entered in favor of the Plaintiff for her pro-rata share of the \$606,500.00 which was available from the segregated assets for the note holders who did not accept the terms of the offer, and that due notice be given to all other holders of said notes to file their claims within a short date, and that judgment be entered for their pro-rata share, or, in the second alternative:

3. That the Defendant be required to account to the Plaintiff individually and for the common use and benefit of all note holders for the segregated assets and assigned securities which were not distributed to the \$1,213,000.00 holders of said notes.

Meyer Abrams, and
Bennett I. Schlessel,
Attorneys for Plaintiff.

Opinion of Court.

[SAME TITLE]

MEMORANDUM.

Rifkind, J.

Both parties move for summary judgment upon the same papers. These papers consist of, 1, the complaint; 2, the complaint in the action entitled Elias Hackner, et al., Plaintiffs, v. J. P. Morgan, et al., Defendants; 3, three affidavits submitted by defendants on defendants' motion for summary judgment in the Hackner action; 4, three exhibits submitted by the defendants on defendants' motion for summary judgment in the Hackner action; 5, an affidavit by F. A. O. Schwarz, and, 6, a stipulation of facts. Both parties declare that only an issue of law divides them.

The substance of the complaint is that plaintiff is the owner of \$6000 principal amount of notes of Van Sweringen Corporation issued pursuant to a trust indenture in which defendant is named trustee; that subsequent to the execution and delivery of the indenture, defendant acquired an interest in conflict with that of the noteholders by participating in loans to the parent and the subsidiary of the Van Sweringen Corporation; that thereafter, when the obligor of the notes became financially embarrassed and the defendant was in a position to take one of several courses, defendant took the one which served its own interest and neglected the interest of the noteholders; and that, in consequence, plaintiff's notes have become worthless. The prayer for relief seeks a judgment directing defendant to account to plaintiff, and other noteholders similarly situated, for the face amount of the notes plus

Opinion of Court.

unpaid interest, or, in the alternative, for the benefit defendant received by means of its breach of duty.

The vicissitudes which attended the \$30,000,000 note issue; of which plaintiff's notes are a part, the nature of the trust indenture, and the action taken by defendant are all fully set forth in *Eastman v. Morgan*, S. D. N. Y., 1942, 43 Fed. Supp. 637, affirmed, sub nom. *Hackner v. Morgan*, C. C. A. 2, 1942, 130 Fed. (2d) 300, certiorari denied, 317 U. S. 691. It is superfluous to repeat here what has already been so clearly recited. For present purposes it suffices to point out merely the feature which distinguishes the facts of the instant case. Whereas the *Hackner* action was on behalf of noteholders who had accepted the offer of the Van Sweringen Corporation and had received, in exchange for their notes, 50 cents on the dollar in cash and some common stock of the obligor corporation, plaintiff here belongs to the small group which rejected that offer. Holders of notes in the principal amount of \$1,213,000 belonged to this group. In every other respect the facts of the two cases are identical, and the motions are made on the very affidavits upon which the *Hackner* motions were made. Upon such facts the Court of Appeals has held that no showing of a breach of trust has been made. A majority of the court regarded that conclusion adequate to support a dismissal of the complaint on the merits. This Court feels bound to respect the authority of the decision.

If the conduct of defendant was not wrongful, it must follow that any loss suffered by plaintiff was not ascribable to misconduct of the defendant but to plaintiff's failure to avail herself of the exchange offer, which on the basis of the facts here presented must be deemed to

Opinion of Court.

have been a prudent proposal both from the point of view of the noteholders, as well as the defendant. Plaintiff stresses the presence of a fiduciary relationship between the defendant and the noteholders. *Clarke v. Chase National Bank*, C. C. A. 2, July 29, 1943. But by whatever name we call the aggregate of defendant's obligations, these were as present in the *Hackner* case as in the instant case. They were found, in the *Hackner* case, insufficient to support an action, irrespective of the argument of lack of damage. I am obliged to find that they fail to support an action here.

Defendant's motion is granted and the complaint dismissed. Plaintiff's cross motion is denied.

Simon H. Rifkind

U. S. D. J.

Dated, October 7, 1943.

Endorsed:

U. S. District Court.

Filed: Oct. 7, 1943.

S. D. of N. Y.

Order for Judgment.

[SAME TITLE]

The above-named defendant, Guaranty Trust Company of New York, having moved under Rule 56 of the Rules of Civil Procedure for summary judgment in its favor against the plaintiff, Grace W. York, herein, and said plaintiff having made a cross-motion for summary judgment in her favor against said defendant, and the said motions having duly come on to be heard,

It is, on motion of Davis Polk Wardwell Gardiner & Reed, attorneys for defendant Guaranty Trust Company of New York,

Ordered, that defendant's said motion for summary judgment be and the same is hereby granted in all respects,

Further ordered that the cross-motion of plaintiff, Grace W. York, for summary judgment be and the same is hereby denied in all respects,

Further ordered, that the defendant, Guaranty Trust Company of New York, have judgment against the plaintiff, Grace W. York, herein, dismissing the complaint on the merits,

Further ordered, that defendant, Guaranty Trust Company of New York, recover judgment against the plaintiff, Grace W. York, for the costs and disbursements of this action,

Further ordered, that the Clerk of this Court is directed to enter judgment accordingly.

Dated: New York, N. Y., October 18, 1943.

Simon H. Rifkind

U. S. D. J.

Judgment.

[SAME TITLE]

The above named defendant Guaranty Trust Company of New York having moved under Rule 56 of the Rules of Civil Procedure for summary judgment in its favor against the plaintiff Grace W. York, and said plaintiff having made a cross-motion for summary judgment in her favor against said defendant, and the said motions having duly come on to be heard, and the Court having granted defendant's said motion for summary judgment in all respects, and having denied the cross-motion of said plaintiff in all respects by an order dated October 18, 1943, and filed in the office of the Clerk of this Court on October 18, 1943, and costs and disbursements having been taxed by the defendant in the sum of \$21.40.

Now, on motion of Davis Polk Wardwell Gardiner & Reed, attorneys for said defendant, it is

Adjudged, that the complaint of the plaintiff Grace W. York be and the same hereby is dismissed on the merits, against the defendant Guaranty Trust Company of New York, and that said defendant recover of said plaintiff Grace W. York the sum of \$21.40, its costs and disbursements as taxed, and, that said defendant have execution therefor.

Judgment rendered and signed, October 22nd, 1943.

George J. H. Follmer

Clerk

Notice of Appeal.

[SAME TITLE]

Plaintiff, Grace W. York, by Meyer Abrams and Bennett I. Schlessel, her attorneys, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment entered in this cause on October 22, 1943, sustaining defendant's motion for a summary judgment against the plaintiff and denying plaintiff's counter motion for a summary judgment in her favor, and entering judgment for costs against the plaintiff, to the end that the judgment be reversed with directions to overrule defendant's motion, to grant plaintiff's counter motion, and to enter a summary judgment in plaintiff's favor against the defendant, and for such other relief as to the court may seem proper.

Grace W. York, Plaintiff,
Meyer Abrams
Bennett I. Schlessel,
Her Attorneys

Dated, November 3, 1943.

Statement of Points.

The following is a statement of points upon which appellant relies in connection with the appeal taken from the summary judgment in defendant's favor:

1. The District Court erred in granting defendant's motion for a summary judgment and in entering judgment in favor of the defendant and against the plaintiff and taxing plaintiff with the costs.

2. ~~It was~~ the duty of the District Court to hold that the Trustee violated its fiduciary duty and actively participated in a scheme to deprive the plaintiff and the other noteholders of their share in the segregated assets to the extent of \$606,500, and it was its duty to deny the defendant's motion for a summary judgment, and to direct it to answer or to enter the summary judgment in favor of the plaintiff and against the defendant.

3. It was the duty of the court to find that the defendant breached its fiduciary duty to the noteholders and that it gained an undue advantage over them while it stood in an adverse position, and by reason thereof the defendant is liable and accountable to the plaintiff as well as to the other noteholders who did not receive anything out of the assigned securities.

4. It was the duty of the court to hold that the relationship between the noteholders and the Trustee was of a fiduciary character regardless of the question whether the indenture constituted a trust, and it erred in holding otherwise.

Statement of Points.

5. The court erred in applying the decision in the Eastman case to this case and in entering the judgment based on such decision when it appeared to the court that the issues were different, and it was the duty of the court to pass upon the issues independently of the decision of the Eastman case.

6. It was the duty of the court to deny defendant's motion for a summary judgment and to direct it to answer the complaint on its merits, or in the alternative to grant the summary judgment in favor of the plaintiff; and the court erred in entering judgment against the plaintiff, and its judgment should be reversed with proper directions.

Meyer Abrams

Bennett L. Schlessel,

Attorneys for Plaintiff Appellant

Shulman, Shulman & Abrams,

Of counsel.

Stipulation As to Record on Appeal.

[SAME TITLE]

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, pursuant to Rule 75 (f), that in lieu of serving and filing Designations as to the contents of the record on appeal herein, the following shall be included in the record on appeal:

1. Complaint filed in this action, with the elimination of the exhibits, but with the following description of the exhibits:

Exhibit "A" attached to the complaint is a copy of an agreement which appears at pages 105-111 of the printed record hereinafter referred to.

Exhibit "B" consists of excerpts from the Trust Indenture which appears at pages 75-90 of the said printed record.

Exhibit "C" is a copy of the agreement which appears at pages 119-126 of the aforementioned record, having attached thereto (as Exhibit "A") the offer which appears at pages 70-73 of the said printed record as Defendant's Exhibit 4 for identification.

2. Defendant's notice of motion for summary judgment, together with a stipulation of facts and affidavit of Frederick A. O. Schwarz attached thereto, all dated July 9, 1943.

3. Plaintiff's counter motion for summary judgment exclusive of proof of service.

Stipulation As to Record on Appeal.

4. The following papers filed in the action in this court entitled "Elias Hackner, et al., Plaintiffs, v. J. P. Morgan, et al., Defendants, Civil Action No. 8-344", are to be considered as a part of this record on appeal, but need not be printed in the record, and reference thereto may be made to the printed record already on file in the United States Circuit Court of Appeals for the Second Circuit in Case No. 325:

(a) The complaint as amended after giving effect to the order dated June 11, 1941, eliminating certain allegations, appearing on pages 3-10 of the aforementioned printed record;

(b) The affidavit of George Whitne dated December 17, 1941, the affidavit of Alfred Shriver dated December 18, 1941, and the affidavit of Arthur E. Burke dated December 18, 1941, together with the exhibits annexed thereto, which appear at pages 15-49 and 75-126 of said printed record;

(c) Defendants' Exhibits 2 and 4 for Identification attached to the deposition of Eunice E. Eastman, appearing at pages 61-73 of said printed record;

(d) Exhibit E annexed to plaintiff's Request for Admissions, appearing at pages 127-128 of said printed record.

5. Opinion of Court, dated October 7, 1943.

6. Order for judgment, and judgment.

7. Notice of Appeal.

8. Stipulation as to contents of record on appeal.

9. Statement of Points.

Stipulation As to Record on Appeal.

10. Certificate of Clerk, and stipulation as to record on appeal.

It is hereby further stipulated and agreed that the United States Circuit Court of Appeals on the appeal taken by the plaintiff herein may consider the papers mentioned in item 4 hereof, which appear in the aforesaid record, now on file with that Court, and that the plaintiff-appellant be given leave to file 13 additional copies of said printed record in Case No. 325, to be designated as Volume 2 of the Record on Appeal herein, and that an order may be entered accordingly subject to the approval of the Court.

Dated: New York, N. Y., November 10, 1943.

Meyer Abrams,

Bennett L. Schlessel,

Attorneys for Plaintiff-Appellant

Davis Polk Wardwell Gardiner & Reed

Attorneys for Defendant-Appellee.

Stipulation As to Record.

[SAME TITLE.]

It Is Hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, December, 1943.

Meyer Abrams and Bennett I. Schlessel,

Attorneys for Plaintiff-Appellant.

Davis Polk Wardwell Gardiner & Reed

Attorneys for Defendant-Appellee.

Certificate of Clerk.

[SAME TITLE]

United States of America,

Southern District of New York—ss.

I, George J. H. Follmer, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, in the Southern District, this 6th day of December, in the year of Our Lord One Thousand Nine Hundred and Forty-three and of the Independence of the said United States the one hundred and sixty-eighth.

George J. H. Follmer,
Clerk

(Seal)

[fol. 35] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

No. 256

GRACE W. YORK, Plaintiff-Appellant,
against

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,
Defendant-Appellee

PETITION FOR REHEARING AND TO AMEND THE OPINION

To the Honorable Judges of the United States Circuit
Court of Appeals for the Second Circuit:

Your petitioner the appellee above named respectfully petitions for a rehearing and for further oral argument and an opportunity to file further briefs in this case, essentially upon the ground that the Court's opinion filed March 2, 1944, determines questions some of which were not heretofore argued or presented in this case; that such determinations are not only erroneous as a matter of law but in some instances revolutionary; and that in certain respects the opinion makes erroneous statements as to the record and should be amended.

By reason of the limitations of Rule XXVII we confine this petition to a brief statement of the grounds upon which reargument is sought, and are unable to set forth fully appellee's position with respect to each of them.

[fol. 36] *The grounds upon which reargument is more particularly sought are:*

1. That in finding a relationship of express trust between appellee and the noteholders this Court has both departed from the authorities established here and failed to give effect to the substantive law of New York (p. 3).

2. That with respect to the statute of limitations the opinion has misconstrued the decision of the Supreme Court in *Russell v. Todd*, 309 U. S. 280, and injected doctrines of substantive law which are contrary to the law of New York (p. 7).

3. That the opinion fails to apply the substantive law of New York with reference to exculpatory clauses in trust indentures (p. 11).

4. That the United States Courts lack jurisdiction of plaintiff's claim because it involves less than \$3,000 (p. 14).

5. That plaintiff acquired her notes more than two years after the transaction complained of and has no right or capacity to maintain this suit (p. 18).

6. That the holding in the opinion to the effect that noteholders in plaintiff's class may, without being concluded by the outcome of her suit, come into her case at a later date without prejudice from the statute of limitations or laches, involves a fundamental inconsistency and is without precedent and is unsound (p. 19).

The points in which petitioner submits that the opinion requires amendment are:

7. That the opinion errs in stating that non-accepting noteholders received interest only up to November 1, 1931, [fol. 37] whereas in fact they received interest up to November 1, 1932 or a further 6% (p. 22).

8. That the record does not support the statements in the opinion that the appellee as "trustee" had any fear with respect to a liquidation of Van Sweringen Corporation as regards the outstanding loan by appellee and other banks to other corporations (p. 23).

9. That petitioner did not in the oral argument in this Court abandon its previous argument with respect to the alleged trust relationship or effect a shift of position (p. 24).

1. In finding a relationship of express trust between appellee and the noteholders this Court has both departed from the authorities established here and failed to give effect to the substantive law of New York.

(a) The opinion erroneously characterizes as "dictum" the decision of the majority (Chase and Clark, JJ.) in the *Hackyer* case to the effect that there was no trust (p. 1077). Three separate grounds were listed by the majority. In the first instance they held that no fraudulent misrep-

sentations had been made to the plaintiff Eastman. As a second reason for affirmance the majority said (130 F. [2d] at 302-3):

"Accepting the District Court's interpretation of the complaint as alleging a breach of trust as well as the fraud, we further agree that there was not, nor could there have been, any showing of a trust here * * * Here there is nothing upon which a trust can be founded."

[fol. 38] The Court then went on to say (p. 303):

"There is, however, another reason why no action could be proved. For even assuming a fiduciary relationship, the plaintiff has suffered no loss or injury by the exchange."

This was listed as an "additional reason the judgment was right" (p. 303).

Judge Frank, who sat in the *Hackner* case, refused to concur in the determination with respect to the non-existence of a trust, saying (p. 303):

"The other issues are less clear and I see no need to consider them".

This is an acknowledgment that the other members of the Court did consider and determine them. They are therefore not dictum.

What has happened is that the Court consisting of L. Hand, A. N. Hand and Frank, *JJ.* has overruled the Court consisting of Chase, Clark and Frank, *JJ.* with regard to the identical question of law upon the identical instruments within a space of two years; and it is respectfully submitted that, for the sake of uniformity and consistency of decision in the administration of justice, that should not occur, at least without full opportunity for argument and adequate consideration. However, the latest determination of this Court was made upon the incorrect understanding, as stated in the opinion (p. 1078), that appellee had this time abandoned and shifted its position. This mistake is referred to at page 24 below.

Attention may also be called to the fact that in the instant case the Court fails to follow its own decision of November 22, 1943 in *Driscoll, et al. v. Public National*

[fol. 39] *Bank & Trust Co.*, 139 F. (2d) 348 (Swan, A. N. Hand and Chase, JJ.), (Advance Sheets of February 7, 1944) affirming on the opinion below 52 F. Supp. 3869. This case was cited in appellee's brief on this appeal, but is not mentioned in the opinion of the Court. The opinion of the Court (p. 1078) does cite *Clarke v. Chase National Bank*, 137 F. (2d) 797 (L. Hand, A. N. Hand, and Chase, JJ.), as holding that under a trust indenture there could be a fiduciary relation with resultant fiduciary obligations despite the absence of a *res*. But the *Clarke* case did not hold that there could be an *express trust* in the absence of a *res*. This Court does not in the opinion proper characterize the relationship here involved as an express trust; but footnote 15 on page 1083 terms the defendant here an express trustee, and this footnote will no doubt be deemed to be binding upon the trial court. As the point may have vital consequences, it is respectfully submitted that it should be reopened to argument. The opinion of the Court at page 1078 treats the conclusion reached in this case as an *addition to the previous decisions* of the Court ("We now add that where, as here, . . .").

(b) A second and independent ground why reargument should be had on this point is that the latest opinion of the Court fails to give effect to the substantive law of New York regarding trusts, although bound to do so by the rule of *Eric R. Co. v. Tompkins*, 304 U. S. 64. The opinion cites New York law for the proposition that there can be an express trust where the trustee does not hold title to any property constituting a *res* for the benefit of the *cestui*. The New York law is distinctly stated in *Brown v. Spahr*, 180 N. Y. 201, 209:

[fol. 40] "There are four essential elements of a valid trust of personal property: (1) a designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee."

Other authorities in New York law and the leading Federal authorities are cited at page 14 of our brief on this appeal.

and in Judge Chase's opinion in the *Hackner* case, 130 F. (2d) at 303. An instructive decision not heretofore cited is *Miller v. National City Bank*, N. Y. Law Journal, June 9, 1942, page 2446, Shientag, J., aff'd 265 A. D. 1040, appeal denied 291 N. Y. 225 (memo.).

The opinion of March 2, 1944 does not discuss or distinguish any of these authorities.

Although intangible personal property such as a chose in action may constitute a *res* and give rise to an express trust, if actually transferred to the trustee to be held for the benefit of the *cestui*, no chose in action was transferred to or held by the defendant under the so-called trust indenture here. This Court has found (p. 1078) that the powers conferred upon defendant to sue on behalf of the note-holders and to accelerate the maturity of the notes in the event of default constituted powers in trust giving rise to an express trust, even though they did not pertain to any interest in any property. No authorities in either the New [fol. 41] York or the Federal courts are cited for this unique proposition, and such powers clearly do not fall within the definition of "powers in trust" set forth in Sections 131-138 of the New York Real Property Law.

The powers to sue and accelerate possessed by the appellee are quite like similar powers frequently granted to an agent under a power of attorney. An agent, although a fiduciary under certain circumstances, would clearly not become a trustee of an express trust merely because he was given such authority by his principal. The finding of an express trust in this instance seems an undue yielding to "verbal formulae"; cf. *Coomber v. Coomber*, [1911] 1 Ch. 723, 728-9.

2. With respect to the statute of limitations the opinion has misconstrued the decision of the Supreme Court in *Russell v. Todd*, 309 U. S. 280, and injected doctrines of substantive law which are contrary to the law of New York.

In *Russell v. Todd* the Supreme Court restated the well-established doctrine (p. 289):

"Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that of law, or the suit

is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations."

No authorities are cited for the proposition advanced by this Court that York's suit is exclusively in equity (opinion p. 1089). In essence this suit is brought by York in aid of a legal right, *i.e.* the right to damages for defendant's in-[fol. 42] action or negligence in failing to liquidate Van Sweringen Corporation. Equity jurisdiction is not exclusive here as it was in the *Todd* case. The jurisdiction of equity is concurrent with that of law. As the opinion states (p. 1084), the measure of defendant's liability "is the loss suffered by the non-accepting noteholders, not the benefits derived by the trustee". It is clear, therefore, that the equitable remedy of accounting is not necessary, as it was in the *Todd* case. This Court's opinion (pp. 1078-9, 1083) makes clear that the sole basis for liability would be the inaction or failure of defendant to bring about the liquidation of the obligor on plaintiff's notes. Inaction or failure to act would constitute negligence and would result in an injury to property. Plaintiff in reality asks that defendant be made to pay her, under the guise of damages, the money which she would have realized if there had been no exchange offer and if defendant had compelled the liquidation of Van Sweringen Corporation in 1931.

Actions may be brought at law against indenture trustees for damages resulting from misconduct on their part in the performance of their trust duties. *Margulies v. Manufacturers Trust Co.*, 148 Misc. 564; *Hunsberger v. Guaranty Trust Company*, 164 A. D. 740; *James v. Cowing*, 82 N. Y. 449. Where the remedy at law is adequate, the legal period of limitations must be applied. *Keys v. Leopold*, 241 N. Y. 189; *Hanover Fire Insurance Co. v. Morse Drydock & Repair Co.*, 270 N. Y. 86; *Clarke v. Boorman's Executors*, 85 U. S. 493, 505. In *Russell v. Todd*, 309 U. S. at 289, are cited twelve other cases in the Supreme Court and the lower Federal Courts to the same effect. If a plaintiff is seeking damages for negligence or for injury to property resulting because of a breach of [fol. 43] fiduciary duty, the remedy at law is considered adequate. *Savings Bank of New London v. New York Trust Co.*, 27 N. Y. S. (2d) 963 (suit against indenture trustee); *Ansbacher v. New York Trust Co.*, 280 N. Y. 79 (suit

against indenture trustee); *Potter v. Walker*, 276 N. Y. 15; *Singer v. Carlisle*, 26 N. Y. S. (2d) 172, aff'd 261 A. D. 897, appeal denied 285 N. Y. 863; *Corash v. The Texas Company*, 264 A. D. 292; *Kalmanash v. Smith*, 291 N. Y. 142, 159. This is true even if the action be of a type cognizable in equity such as derivative stockholders' suits, where an accounting is always demanded of the defendant for breach of fiduciary duty. *Potter v. Walker*, *Singer v. Carlisle*, *Corash v. The Texas Company*, *supra*.

The gist of plaintiff's action is injury to property. It hence would be barred by the New York six-year statute (C. P. A. § 48, subd. 3), as it existed prior to September 1, 1936, when the period of limitations was reduced from six to three years.

Even if this suit were to be considered as being exclusively within the equity jurisdiction of the court, the rule stated in *Russell v. Todd* would require this Court to apply the New York ten-year statute of limitations embodied in § 53 of the Civil Practice Act. The Supreme Court there said (p. 289):

"But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling." (Italics supplied.)

[fol. 44] Since the Supreme Court found that there was no three-year statute in New York applicable to the cause of action there asserted but merely the ten-year statute applying to all actions in equity (C. P. A. § 53), the refusal of the lower courts to give effect to the three-year statute was upheld. But in the instant case there is a New York statute applicable to plaintiff's claim, even if considered as a claim cognizable only in equity. § 53 governs all equitable actions, including suits for breach of fiduciary duty where the remedy at law is inadequate. *Potter v. Walker*, 276 N. Y. 15; *Goldstein v. Tri-Continental Corporation*, 282 N. Y. 21. It has also been applied in an action against an indenture trustee for breach of duty. *Rhinelanders v. Farmers' Loan & Trust Co.*, 172 N. Y. 519, 536. Under the rule of the *Todd* case, therefore, this Court should have

at least applied the ten-year statute, even though it did find, as we think erroneously, that the suit was exclusively in equity.

The rule of *Erie R. Co. v. Tompkins* requires exclusion from this case of the old equity doctrine of laches, because that rule requires this Court to follow the substantive law of New York and the doctrine of laches, which is a doctrine of substantive law (*Mendez v. Holt*, 128 U. S. 514), does not exist in the substantive law of New York. New York has abolished laches as a defense against a claim of right. The only defense against such a claim by reason of the lapse of time is limitations. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 130. The use of the doctrine of laches to supplant limitations and thus to extend the period within which an action would otherwise be barred by statute, as was done here, has been foreign to the law of New York since 1848. Since that time New York has imposed a fixed limitation [§ 45] of time upon every remedy, whether legal or equitable. *Gilmore v. Ham*, 142 N. Y. 1. Laches, having no longer a place in the law of New York as a bar to claims of right, should not be employed in the Federal equity practice in New York in derogation of the New York statute of limitations which precisely applies.

Although the application of the statute of limitations was argued in appellee's brief on this appeal, it was argued without reference to the question of *Russell v. Todd*, in reliance (justifiable, we submit) upon the principle already settled by the *Hackner* decision upon the same record that a trust is not here involved. The opinion of March 2, 1944 raises questions not heretofore presented, and determines points not argued by counsel on either side. As the point is an important one of general application, it is respectfully urged that further oral argument with opportunity for briefs on the subject would be in the interest of justice.

3. The opinion fails to apply the substantive law of New York with reference to exculpatory clauses in trust indentures.

The indenture here involved provided that the trustee "shall not be answerable . . . for anything whatever in connection with this trust except for its own wilful misconduct" (R. 98). The opinion, without citation of authority, assumes that defendant despite this exculpatory clause would be liable for any loss to any noteholder result-

ing from its failure to cause a liquidation of Van Sweringen Corporation, merely because of the "presence of a substantial adverse interest" (p. 1079), and even assumes further that defendant could probably have compelled such a liquidation in November, 1931 (pp. 1078-9), although the record [fol. 46] does not justify any such assumption. The opinion completely overlooks the provisions in the indenture permitting the trustee to occupy a dual position. The trustee was permitted to acquire, own and deal in the notes issued under the indenture and to "assert its rights in respect thereof in the same manner as any other noteholder" (R. 100). The indenture likewise allowed the trustee to "engage in or be interested in any financial or other transaction with the Company [Van Sweringen Corporation] or any corporation in which the Company may be interested", which would include the loan made to Cleveland Terminals Building Company (R. 100).

The opinion again disregards the exculpatory clause of the indenture in holding (p. 1083) that, even if defendant had no belief that its inaction would be to its own substantial benefit, it would still be guilty of a breach of trust provided an ordinary reasonable man, informed of the facts, would have thought that substantial selfish advantages might well accrue to the trustee through its failure to exercise the powers given to it under the indenture, and that under such circumstances it would make no difference whether the trustee in fact derived benefits if its inactivity caused loss to the beneficiaries. Such a test of liability eliminates any subjective element and thereby completely nullifies the provision in the indenture absolving the trustee from all liability except for "wilful misconduct". Under this standard, liability would be imposed even in the absence of negligence or fault of any kind. But it is the judgment and skill of this appellee for which the noteholders contracted, not the judgment and skill of the "ordinary practical reasonable man". In fact, the effect of the opinion of March 2, 1944 would seem to be that where two possible courses of action are open to a trustee, the first of [fol. 47] which is clearly better for the beneficiaries than the second, *he must at his peril adopt the course of action which will be worse for the beneficiaries* if the better course of action might involve the possibility of personal advantage to the trustee. This would seem clearly to be not only new law but bad law. Doubtful as would be the validity

of such a rule in any case, here it also cuts across the express contractual provision that the trustee is to be liable only for "wilful misconduct".

The Court thus failed to apply the New York law governing exculpatory clauses. Authorities sustaining and applying exculpatory provisions of this nature include *Ansbacher v. New York Trust Company*, 280 N. Y. 79; *Hazzard v. Chase National Bank*, 159 Misc. 57, aff'd 257 A. D. 950, aff'd 282 N. Y. 652; *Benton v. Safe Deposit Bank*, 255 N. Y. 260; and *Green v. Title Guarantee & Trust Co.*, 223 A. D. 12, aff'd 248 N. Y. 627.

The *Hazzard* case is dismissed in a footnote (p. 1083) as being different on the facts. The facts were different only in that they presented an infinitely stronger case for the imposition of liability on the trustee. Defendant there held securities concededly in trust for the benefit of debenture holders. The trial court found (159 Misc. at 63) that the trustee "occupied a position inconsistent with its role as trustee under the indenture" because it was the largest single creditor of the obligor of the debentures. He also found (p. 78) that the trustee had been negligent in permitting a substitution of worthless securities for the good securities held by it as security for the debenture holders. Yet the trial court and both New York appellate courts gave effect to the exculpatory clause in the indenture relieving the trustee of liability in the absence of gross negligence [fol. 48] or bad faith. In doing so Rosenman, J. (159 Misc. at 83-4) pointed out that a corporate trustee under an indenture has little in common with the ordinary trustee in so far as the duty of undivided loyalty is concerned; that the status of an indenture trustee is really more that of a stakeholder than a trustee; and that it is the common practice of corporate trustees to assume rather than refrain from occupying inconsistent positions.

This point was not argued previously because of appellee's reliance (again justifiable, we submit) upon the square holding in the *Hackner* case that no trust existed and because of the limitations of time and the rule of this Court limiting the brief. It is submitted that the principle of the opinion of March 2, 1944, revolutionary as it is and unsupported by the authorities, should not stand without at least further examination in the light of a reargument.

4. The United States courts do not have jurisdiction of plaintiff's claim because there is not involved \$3,000 exclusive of interest and costs.

The opinion states (p. 1091n) that plaintiff's claim "with interest since 1931" appears to exceed the jurisdictional amount. In so far as a finding of jurisdiction is predicated upon interest, it is obviously in violation of 28 U. S. Code §41. The reference to the year 1931 is, as shown herein-after, a misapprehension of this record. And this Court has already determined, and apparently still considers, that as much as \$3,000 cannot be involved in the York claim.

York previously intervened as plaintiff in the *Hackner* suit. The *Hackner* suit as so constituted was dismissed by the District Court (Clancy, D. J.) on August 1, 1940 for [Vol. 49] lack of the \$3,000 jurisdictional amount. The proceedings appear in the transcript of the record in this Court in *Hackner v. Guaranty Trust Company*, 117 F. (2d) 95, certiorari denied 313 U. S. 559.

This Court (A. N. Hand, Swan, and Clark, J. J.) unanimously sustained dismissal for lack of jurisdiction saying (p. 98):

"The proffered amendment added one plaintiff, York, who had never transferred her bonds; seemingly, therefore, she sustained no damage, but at any event, the possible loss of 50 per cent of her investment of \$6,000 would be just under the required amount".

York sought reargument with particular reference to the jurisdictional point, but reargument was denied by this Court. Hence the opinion herein is in error in inferring (p. 1076) that York was dismissed in the prior case because "her claim was of a different character".

Upon a full presentation of the facts under Rule 56, this Court's opinion of March 2, 1944 concludes (p. 1071) that a liquidation of Van Sweringen Corporation would have yielded the noteholders a little more than 51% of the face amount of their notes from the segregated assets and assigned securities, if no allowance were made for liquidation expenses, and anywhere from 42.2% to 49% if such expenses, estimated at \$590,000, were deducted.

Besides the segregated assets and assigned securities the only assets of Van Sweringen Corporation were about

\$2,000 in cash, its stock investment in its subsidiary Cleveland Terminals Building Company, and the \$27,000,000 open account indebtedness of the latter (R. 64). Upon substantially the present record, in the *Hackner* case the Court [fol. 50] (Chase, Clark, and Frank, *JJ.*) found that Van Sweringen Corporation's investment in the stock of its subsidiary was "worthless" (130 F. [2d] 300 at 303). This Court (L. Hand, A. N. Hand, and Frank; *JJ.*) in the instant case says it appeared "to have become valueless" (opinion p. 1068). In the *Hackner* case this Court also found, upon substantially the present record, that the \$27,000,000 open account indebtedness from Cleveland Terminals Building Company to Van Sweringen Corporation "was practically, if not entirely, worthless" (130 F. [2d] at 303).

By reason of these findings the Court (Chase, Clark, and Frank, *JJ.*) in the *Hackner* case found that the plaintiff Eastman, who accepted the offer and received 53 cents on the dollar, suffered no loss or injury. This finding in the *Hackner* case is accepted by the opinion herein (p. 1077), written by a Judge who participated in the *Hackner* case. Logically the finding constitutes a determination that non-accepting noteholders also could not have recovered more than 53 cents on the dollar if Guaranty Trust Company had forced a liquidation of Van Sweringen Corporation. It fixes a ceiling above which York's claim for damages could not hope to rise. But this ceiling is even lower than the Court thought, because of a further 6% payment which York admittedly received and which has been overlooked by the Court. As a non-accepting noteholder, York received a further 6% interest after the exchange offer, *viz.* interest up to and including November 1, 1932 (R. 34-5). This fact is undisputed and is confirmed by the fact that York in her present complaint asks interest only from November 1, 1932 (Tr. 11), not from November 1, 1931 as the opinion herein erroneously infers (p. 1076, 1091n).

[fol. 51] Deducting from York's potential 53 per cent. recovery the 6% interest received by non-accepting noteholders (November 1, 1931 to November 1, 1932), which accepting noteholders did not receive, and the 3% interest due November 1, 1931, which all noteholders received, we have it as a mathematical certainty that York could not have lost more than 44 cents on the dollar, or 44% of \$6,000, or \$2,640, by reason of the exchange offer. This

calculation jibes with the computations in the opinion herein, above mentioned, that the noteholders on liquidation would have received from 42.2% to 49% after deduction for expenses; or alternatively that the noteholders would have obtained little more than 51%, without allowance for expenses of liquidation. This figure is reduced to 42% by subtraction of the 9% additional interest received by non-accepting noteholders.

While it may be noted that the percentage computations of loss appearing in the opinion of March 2, 1944, do not take account of the open account indebtedness of Cleveland to Van Sweringen Corporation, which is given various values in the opinion, we do not assume that the author of the opinion meant to reverse the previous finding of this Court in the *Hacknor* case, in which he concurred, that the open account indebtedness was practically worthless. Indeed the valuations of the open account indebtedness in this opinion appear not to be intended as findings at all but merely characterizations of a balance sheet (pp. 1086-7).

Since it now appears as a legal certainty that plaintiff's claim against defendant cannot possibly exceed \$3,000 exclusive of interest and costs, this Court should dismiss the case for lack of jurisdiction rather than subject the defendant to a long and burdensome trial in a District Court lacking jurisdiction.

[fol. 52] 5. Having acquired her notes more than two years after the transaction complained of, plaintiff has no right or capacity to maintain this suit.

Plaintiff acquired her notes by gift more than two years after the alleged breach of trust complained of (Tr. 16). This undisputed fact was referred to several times in defendant-appellee's brief (pp. 2, 8, 38, 42), but was not separately argued and perhaps therefore not considered by the Court. Under the decision just rendered each non-accepting noteholder has an individual right of action to recover damages sustained by reason of the alleged breach of trust. But only noteholders who held their notes at the time of the alleged breach (i.e. in 1931), would have the right to maintain the action. *Elkind v. Chase National Bank*, 259 A. D. 661, aff'd 284 N. Y. 726; *Emmerich v. Central Hanover Bank & Trust Co.*, 291 N. Y. 570; *Clarke v. Chase National Bank* (Docket No. Civ. 17-121, S. D.

N. Y., not reported), aff'd 137 F. (2d) 797 (L. Hand, A. N. Hand and Chase, JJ.). The District Court had stated: "No action can be maintained by debenture-holders who were not such at the time the breaches of duty took place."

The *Elkind* case represents the substantive law of New York which should govern this situation. It is cited with approval by this Court in the *Clarke* case, 137 F. (2d) at 801. This Court in *Manufacturers Trust Co., v. Kelby*, 125 F. (2d) 650, made clear (p. 652) that it will follow New York Substantive law, including the *Elkind* case, but concluded that case was not applicable to a claim against an express trustee for restoration of trust property which had been misappropriated or wrongfully surrendered by the [fol. 53] trustee. This distinction is not applicable to the instant case. The appellee received from the debtor no property in trust for the noteholders, and there was no misappropriation or surrender of trust property.

It is difficult to see what equity or public interest is involved in presenting a complex and costly litigation of this character to a mere donee of paper where the donor, so far as appears, had himself no complaint regarding the transaction which occurred while he held it. While we did not present this question below, this Court may take notice of it where necessary in order to affirm the District Court. *American Legion Post v. First National Bank*, 113 F. (2d) 868, 872.

6. The holding to the effect that noteholders in plaintiff's class may, without being concluded by the outcome of her suit, come into her case at a later date without prejudice from the statute of limitations or laches, involves a fundamental inconsistency and is without precedent and is unsound.

The effect of this holding (opinion pp. 1091-4) is that other members of the so-called class may await the outcome of York's suit, take the benefit if she wins, but not be bound if she loses. In the meantime, according to the opinion, they are to suffer no prejudice from limitations or laches if they later determine to intervene, but apparently are to be barred by the lapse of time if they do not intervene but institute their own action. It is submitted that this decision will have unforeseen and undesirable consequences in

the application of Rule 23 and that, being without precedent, it should be examined on reargument. No previous opportunity [fol. 54] has been given to counsel to discuss the question involved.

Neither the *Hackner* case nor this case is a true class suit, as this Court properly held, since the claims of the individual accepting and non-accepting noteholders are several. They fall within Rule 23(a)(3) which has been designated as a "permissive joinder device" (2 *Moore Federal Practice*, 2241). Actions brought thereunder are known as "spurious" class suits. *Hackner v. Guaranty Trust Company*, 117 F. (2d) 95, 97-8; *Central Mexico Light & Power Co. v. Munch*, 116 F. (2d) 85, 88. A judgment in such a suit is not binding on the other members of the class. It is therefore difficult to see why it should benefit any member of the class prior to the moment he actually joins.

Attention is called to the fact that the opinion of March 2, 1944 proceeds on a mistaken assumption in treating York's original participation in the *Hackner* suit as an intervention for her class. The *Hackner* suit was originally brought as a representative suit on behalf of noteholders who had accepted the exchange offer (record in this Court in first *Hackner* appeal p. 8). York's intervention by amendment did not characterize her as a member of the class but on the contrary excluded her from the class of accepting noteholders, and treated her as an individual (record in this Court in first *Hackner* appeal pp. 35-6). She did not purport to bring her suit at that time on behalf of the class of non-accepting noteholders. Hence footnote 22a on page 1092 of the opinion is erroneous.

Even if the *Hackner* suit had been brought on behalf of all noteholders, it is submitted that the rule stated by the Court should not be applied in a "spurious" class suit brought under Rule 23(a)(3). In *Deckert v. Independent [fol. 55] Share Corporation*, 39 F. Supp. 592, cited in this Court's opinion, a District Court for Pennsylvania found the suit was of the "hybrid" variety under Rule 23(a)(2); rather than a "spurious" class suit. The reasoning of the Court as to the tolling of limitations in the type of suit there presented seems to be based upon the presence of a common fund in which the parties are equally interested. In a "spurious" class suit like the present no common fund is involved, the claims of the noteholders are separate, and

the defenses thereto may vary according to the noteholder involved, as this Court has pointed out.

The noteholders here could not have been lulled into a false sense of security, if they had known of the institution of the *Hackner* suit and York's attempted intervention therein because as shown by the complaint the action did not purport to be brought on their behalf. Presumably if any noteholders had heard of the case, they would have brought separate actions in their own right. The suggestion in the opinion (pp. 1093-4) that the commencement of a suit under Rule 23(a)(3) might act as a "trap" unless limitations or laches were to be tolled therewith for the benefit of subsequent intervenors, seems to lack reality. The commencement of such a suit will not act as a trap if either it is not known to the class or the legal effect is clearly announced by the Court.

There is no more reason why, so far as an inert member of the class is concerned, the commencement of a "spurious" class suit should extend his time to assert his own claim than there is that he should be bound by the judgment as *res judicata*. Yet he is not so bound if he does not intervene. The rule enunciated in this Court's opinion, would unfairly work to the defendant's disadvantage in the [fol. 56] "spurious" class suit, in that it would encourage possible claimants to stand by pending determination of the York action and thus postpone to the Greek Kalends the determination of the defendant's total liability and (what is worse from the point of view of either limitations or laches) also postpone the production of the documents and witnesses upon which the subsequent claims may depend. Yet, while the defendant is thus penalized, the members of the "class" may, if the York suit be successful, take its benefits without its burdens.

It would appear to us that the policy of such a rule novel as it is, deserves re-examination.

7. The opinion is in error in stating that non-accepting noteholders received interest only up to November 1, 1931, whereas in fact they received interest up to November 1, 1932, or a farther 6%.

The statement of the Court at page 1076 is:

"The non-accepting noteholders received for their investment nothing except interest up to, and including,

November 1, 1931 (i.e. interest for one and one-half years) * * *

At page 16 above we have given the record references establishing that without dispute this statement is erroneous and the date November 1, 1932, meaning interest for two and one-half years, should be substituted.

[fol. 57] 8. The record does not support the statement in the opinion that the appellee as "trustee" had any fear with respect to a liquidation of Van Sweringen Corporation as regards the outstanding loan by appellee and other banks to other corporations.

The statement of the Court on this point appears at the middle of page 1070 and comprises the whole paragraph beginning "The trustee, however, feared * * *". Statements of a similar nature appear at pages 1080 and 1081.

We believe these statements (particularly the first and third sentences of the paragraph beginning in the middle of p. 1070) are based upon a complete misconception of the record and constitute inadvertent error which may be seriously prejudicial to the defendant upon a subsequent trial. For the facts, which appellant has stipulated to be true (Tr. 16-7), reference is made to the very full affidavits of Messrs. Shriver, Whitney and Burke, more particularly at R. 43-5, 28, and 49. These fully establish honesty and good faith on the part of those acting for the appellee in connection with the exchange offer, and show its sole motive to have been the obtaining for *all* noteholders the best possible advantage under very difficult circumstances. In addition to honest motive the "trustee" brought to the situation expert judgment informed by legal advice, as these affidavits show. Under Rule 56 this record should have the legal weight attached to the evidence upon a full trial. Especially in connection with the question of the exculpatory clause above discussed, the gratuitous imputation to the "trustee" of conflicting considerations of fear and self interest is harmful and unfair, and should be corrected.

[fol. 58] 9. Petitioner did not in the oral argument in this Court abandon its previous argument with respect to the alleged trust relationship or effect a shift of position.

The Court's statement on this point is found in the middle of page 1078 and in footnote 13a. We regret that

the Court should have so fundamentally misunderstood the nature and object of our oral argument. In view of the limitation of time, the previous holdings of this Court as to the legal position, and the desire expressed by the Judges for a full discussion of the facts, appellee's counsel on the argument, held February 1, 1944, expressly confined themselves to the proposition that defendant met the highest standard of fiduciary conduct and that no damage was suffered by York in any event. In so doing, according to our own definite recollection, appellee's counsel fully reserved the question of the existence of a trust or fiduciary duty, leaving this question to the definite argument contained in the brief, and predicated the oral argument on the *assumption* that some kind of fiduciary duty existed.

Conclusion

By the opinion of March 2, 1944 this Court has reversed itself upon the law and to some extent upon the facts, and has announced propositions of law of possibly far-reaching effect without the attention or the argument or the briefs of counsel having been directed to these propositions. This is not the ordinary petition for rehearing. Many of the points covered in this petition will, if it be granted, be presented by counsel in this case for the first time. It is submitted that the proper administration of justice requires that this petition be granted, and that a date be set for the [fol. 59] filing of the briefs of counsel and for further oral argument upon the points above stated (except in so far as the Court may amend the opinion of its own accord on points of fact). We shall be glad to reargue the case generally, but we have confined our statement to the points of greatest import upon which we respectfully suggest that error has been committed.

Respectfully submitted, Davis Polk Wardwell Gardiner & Reed, Attorneys for Defendant-Appellee,
Guaranty Trust Company of New York.

March 16, 1944.

(fol. 60)

Certificate of Counsel

Ralph M. Carson, one of the attorneys for the petitioner and a member of the firm of Davis Polk Wardwell Gardiner & Reed, (now Davis Polk Wardwell Sunderland & Kiendl),

attorneys for the petitioner, certifies that he is a member of the bar of this Court; that he has prepared the foregoing petition and is familiar with all the facts stated therein; that the foregoing petition is submitted in good faith and not for purposes of delay; and that he believes it to be meritorious.

New York, N. Y., March 16, 1944.

Ralph M. Carson.

[fol. 61] Grace W. York v. Guaranty Trust Company of New York

No. 256—October Term 1943

Having considered appellee's petition for rehearing, the court does not desire to hear further arguments concerning points 1, 6, 8 and 9 of the petition. Appellee, however, is given leave to file a brief, on or before April 10, 1944, with respect to the following:

1. In the light of the statement in *Russell v. Todd*, 309 U. S. 280, 287, ("The Rules of Decision Act does not apply to suits in equity"), this court thinks that, as to state statutes of limitations in suits of equity, the doctrine remains what it was before *Eric v. Tompkins*, 304 U. S. 64. On that basis, is not the character of the equity jurisdiction here to be decided without reference to state decisions allowing such a suit to be brought at law? If so, what is the nature of the present suit under federal decisions? Even if, under federal decisions, this suit is not exclusively within the jurisdiction of equity, will not the federal decisions as to laches apply here, because the state statutes of limitations "conflict with equitable principles" due to the "inequitable conduct of the defendant?" (See 309 U. S. 288, footnote 1.)

2. If this suit were pending in a New York State Court, would the New York decisions cited in point 3 of appellee's petition relieve appellee of liability; or do the facts here serve to distinguish this case?

3. Even if those decisions would exculpate defendant in such a suit, must this court follow them, in the light of

the statement in *Russell v. Todd*, quoted above? Cannot a federal court in New York, sitting in equity, hold, without regard to the New York decisions, that a trustee may not, by provisions in a trust agreement, rid itself of liability for conduct inconsistent with the fundamental obligations of a trustee?

[fol. 62] 4. In the light of the statement in *Russell v. Todd* above quoted, is the doctrine of the New York cases cited in point 5 of the petition applicable here?

5. On the facts here, can it be said that it appears as "a legal certainty" that the jurisdictional amount is absent? Discuss the facts in the light of *St. Paul Indemnity Co. v. Ab Co.*, 303 U. S. 283, 288, 290 and cases there cited.

6. The court desires also to have discussed the following questions not raised by appellee in its brief or in its petition for rehearing: In the light of the discussion in *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95 (C. C. A. 2) of the amount of Miss York's claim, of Eastman's claim, and of the right of Eastman to continue the suit, was not the issue of the amount of Miss York's claim finally adjudicated in *Hackner v. Guaranty Trust Company*, *supra*, so that the present action must be dismissed for want of jurisdiction? See *Ripperger v. A. C. Allyn & Co.*, 113 F. (2d) 332 (C. C. A. 2). Assuming that the answer to that question should be yes if the facts here were substantially the same as those before the court in *Hackner v. Guaranty*, *supra*, are the facts here sufficiently different to require a different answer? In that connection, may this court consider the facts in the affidavits in the record here? May appellant be deemed to have incorporated those facts in her complaint, or may she now be allowed to amend her complaint so as to incorporate them?

Appellant may file a reply brief on or before April 24, 1944.

Learned Hand, U. S. C. J. Augustus N. Hand, /
U. S. C. J. Jerome N. Frank, U. S. C. J.

March 30, 1944.

[fol. 63] [Endorsed:] York v. Guaranty Trust Co.
United States Circuit Court of Appeals: Second Circuit.
Filed Mar. 30, 1944. Alexander M. Bell, Clerk.

[fol. 64] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

GRACE W. YORK, Plaintiff-Appellant,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-Appel-
lee

Before: L. Hand, Augustus N. Hand and Frank, C. J.J.

The opinion herein, dated March 2, 1944, is hereby recalled and the revised opinion of this date is substituted therefor. Appellee's petition for rehearing is denied. The motion of appellant for leave to file a supplemental record is denied. The petition of First National Bank of Stillwater, Oklahoma, et al. to intervene is denied without prejudice to the filing of such a petition in the district court when this case is remanded.

Learned Hand, Circuit Judge. Augustus N. Hand,
Circuit Judge. Jerome N. Frank, Circuit Judge.

Filed May 25, 1944.

[fol. 65] [Endorsed:] York v. Guaranty Trust Company
of New York. Order. United States Circuit Court of
Appeals: Second Circuit. Filed May 25, 1944. Alexan-
der M. Bell, Clerk.

[fol. 66] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 256

(Argued February 1, 1944. Decided March 2, 1944
Rehearing Denied and Opinion Revised, May 25, 1944)

GRACE W. YORK, Plaintiff-Appellant,

v.

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,
Defendant-Appellee

Before E. Hand, Augustus N. Hand and Frank,
Circuit Judges

Appeal from a summary judgment in favor of defendant
entered by the United States District Court for the
Southern District of New York. Reversed and Remanded

Meyer Abrams (Chicago, Illinois) and Bennett I. Schlies-
sel, for appellant. (Shulman, Shulman and Abrams (Chi-
cago, Illinois, of counsel.)

Davis Polk Wardwell Gardiner & Reed (Ralph M. Car-
son and Francis W. Phillips, of counsel) for appellee.

[fol. 67] FRANK, Circuit Judge:

1. This case is here on appeal from a summary judgment, for the defendant, entered on the pleadings and affidavits. As a consequence some of the highly complicated facts are not entirely clear and the following statement of facts must be read with that in mind. Wherever in this opinion we refer to our conclusions "on the facts now before us" or use similar locutions, it is to be understood that we are not now making any findings, but are merely deciding that the issues of fact should be decided after the trial court hears the evidence on a trial.

Two brothers named Van Sweringen owned 80% of the stock of The Vaness Company (which we shall call Vaness). That company owned all the stock of a Delaware corporation, Van Sweringen Corporation (which we shall call the debtor), and it, in turn, owned all the stock of the Cleveland Terminals Building Company (which we shall call the sub-

subsidiary). The record is silent concerning the previous history of these parties, but tells us that on May 1, 1930 (some months after the stock market debacle of 1929) the debtor issued \$30,000,000 of notes payable in five years, bearing interest at 6% per annum payable semi-annually. At the time of their issuance, these notes were sold to the public by a syndicate, including the Guaranty Company of New York, a wholly-owned subsidiary of the defendant, Guaranty Trust Company of New York.

The notes were issued under an instrument executed by the debtor and the defendant which described the instrument as a "Trust Indenture" and the defendant as "the trustee." The notes were not made a lien on any assets. The Indenture contained so-called "negative pledge" clauses of a more or less conventional kind. It provided that the debtor would acquire, simultaneously with the issuance of the notes, 500,000 shares of the common stock of Alleghany Corporation which at that time had a market value of \$15,000,000. [fol. 68] Such shares, and any proceeds thereof, were called "segregated assets." The debtor agreed that, until at least \$15,000,000 principal amount of the notes had been retired and cancelled, the debtor would not mortgage, pledge, sell, transfer or otherwise dispose of any of the segregated assets, "except for cash, to be applied by the debtor only for the following purposes: (a) to be held as cash; (b) to retire the notes by purchase or redemption, all notes so retired to be cancelled; (c) to purchase common stock of said Alleghany Corporation; (d) to purchase United States Government obligations; or (e) to purchase and hold uncanceled in its treasury any of the notes." The Indenture provided that, whenever the aggregate value of the "segregated assets" exceeded 50% of the principal amount of all notes outstanding, the amount of such excess should no longer be subject to such restrictions and might be used by the debtor for its general corporate purposes.

There then followed provisions about which it might be said that the present suit revolves: The Indenture stated that in accordance with an agreement simultaneously executed by the trustee and the Van Sweringen brothers,¹ they agreed that, whenever the value of the "segregated assets" became less than 50% of the principal amount of

¹ That agreement was executed simultaneously with the Indenture.

all notes then outstanding, the Van Sweringens would repair such deficiency by assigning and delivering to the debtor readily marketable securities in an amount sufficient at their then market value to equal the amount of such deficiency. Such securities were referred to as "assigned securities." For the "assigned securities" the debtor was to give the Van Sweringens a non-negotiable obligation which the Van Sweringens were to hold in trust for the benefit of the holders of outstanding notes to the extent that, in the event of a liquidation of the debtor and after full distribution to the holders of the notes, a deficiency in [fol. 69] the full payment of the notes and accrued interest thereon might remain, the Van Sweringens would, to meet such deficiency, pay to the trustee for distribution to the note holders all monies the Van Sweringens received in such liquidation on account of such non-negotiable obligation. Such "assigned securities" (subject to withdrawal provisions described below) were to be available to the creditors of the debtor for application to the payment of the debtor's liabilities; as the defendant construes the instrument, those securities (until such withdrawal) were to be the property of the debtor. The instrument contained these unusual withdrawal provisions: When \$15,000,000 of the notes were retired and cancelled, then all obligations of the Van Sweringens should terminate and they were to have the right to withdraw and to have reassigned and delivered to them by the debtor all "assigned securities," on the surrender to the debtor of any obligation theretofore issued to the Van Sweringens therefor. Also, at any time before the debtor's liquidation, any excess in the "assigned securities" was to be withdrawable by the Van Sweringens.¹⁰

¹⁰ Clause 2 of the agreement between the trustee and the Van Sweringen brothers reads as follows: "2. The Corporation shall deliver to the Van Sweringens in respect of any such assignment and delivery by the Van Sweringens to the Corporation of such readily marketable securities the stock or obligations of the Corporation. In case any such consideration consists of obligations of the Corporation such obligations shall be in non-negotiable form and shall provide that the same shall be held (except as they may be surrendered to the Corporation as hereafter provided) in trust for the benefit of the holders of said notes to the following extent, that in the event of a liquidation of the

[fol. 70] The Indenture described various "events of default," including, among others, a default in the payment of any installment of interest continuing for thirty days; a default in the provisions as to the "segregated assets" or in the negative pledge clauses; the appointment of a receiver of the debtor or of the major part of its property, or a judicial declaration that the debtor was bankrupt or insolvent. If any one or more of such events occurred, it was agreed that the trustee "may, and upon the written request of the holders of at least 25% in principal amount of the notes then outstanding, shall, declare the principal of all the notes then outstanding to be due and payable immediately; and upon any such declaration the same shall become and be due and payable immediately, anything in this Indenture or in the

Corporation and after full distribution to the holders of said notes a deficiency in the full payment of said notes and of all accrued interest thereon remains the Van Sweringens to the extent of such deficiency on said notes pay over to the Trustee for pro-rata distribution to the holders of said notes all moneys received by the Van Sweringens pursuant to such liquidation in payment of or on account of such obligations."

Clause 3, relating to the withdrawal of an excess, begins as follows: "3. All securities so assigned and delivered by the Van Sweringens to the Corporation hereunder shall, until the Van Sweringens shall be entitled to withdraw the same as hereinafter permitted, be available to creditors of the Corporation for application to the payment of its indebtedness and liabilities, subject, however, to the following conditions: * * * (Italics added).

As Clause 2 relates to the rights of noteholders in particular and Clause 3 to the rights of creditors generally, there is some ambiguity in those provisions. At least for purposes of this appeal from a summary judgment, we are inclined to construe them thus: Unless, before the debtor's liquidation, the Van Sweringens had surrendered that part of the non-negotiable obligation of the debtor representing such excess, they could not, after liquidation began, withdraw such an excess until the note holders were first paid in full.

However, we shall, from time to time below, note the effect of an interpretation which would permit such withdrawal even after the beginning of liquidation.

notes contained to the contrary notwithstanding. Upon such an acceleration of the maturity of the notes, the debtor was to pay to the trustee the amount due thereon. If it did not do so, then "the trustee, in its own name and as trustee of an express trust" was empowered to institute an action at law or in equity for the amounts thus due and unpaid, to obtain a judgment in such proceedings, and to enforce any such judgment against the debtor. All rights of action under the Indenture or under any of the notes could [fol. 71] be enforced by the trustee without possession of the notes. In the event of any insolvency or bankruptcy of the debtor, the trustee was given power to execute and file proofs of debt on behalf of, and as agent of, the noteholders. The trustee was also given power to institute such proceedings as it might deem necessary or expedient "to prevent any impairment of its rights or the rights of the noteholders by any acts of the" debtor "or of others in violation of the Indenture * * * or deemed by the trustee necessary or expedient to preserve and protect its rights and the rights of the noteholders." No noteholder was to have any right to institute any action under the Indenture or for any remedy thereunder unless the holders of at least 25% of the face amount of the notes then outstanding should first have requested the trustee to act and the trustee, after a reasonable time, failed to do so. It was provided that the trustee should not be liable for anything in connection with the trust "except for its own willful misconduct"; the Indenture contained other exculpatory clauses which we shall later discuss.

Not long after the issuance of the notes, because of a decline in the market price of Alleghany Shares, the Van Sweringens delivered to the debtor, as "assigned securities," 400,000 shares of Alleghany Corporation.

In October 1930, as the time approached for the payment of the first semi-annual installment on the debtor's notes, it faced serious difficulties. Neither the debtor nor its parent Vaness had funds available to pay that interest. Moreover, because of a further decline in the market value of the Alleghany stock, the value of the 900,000 Alleghany shares, constituting the "segregated assets" and "assigned securities," threatened to sink below \$15,000,000, i.e., the requisite 50% of the notes. In order to meet those difficulties and also because of grave financial problems confronting Vaness and the debtor's subsidiary, a group of

[fol. 72] banks (which we shall call the lending banks) headed by J. P. Morgan & Company (which we shall call Morgan) made two loans, one of \$16,000,000 to Vaness¹⁰ and one of \$23,500,000 to the debtor's subsidiary. The defendant, because of the interest of its subsidiary, Guaranty Company, as one of the important sellers of the debtor's notes, participated in these loans to the extent of \$11,000,000. The loan to Vaness was secured by the pledge of various securities, including all the stock of the debtor, i.e., 1,744,800 shares. The loan to the debtor's subsidiary was secured by listed stocks owned by it, having a market value of \$38,000,000. Part of the proceeds of the loan to Vaness was used by it to purchase \$10,000,000 face amount of government bonds which were substituted for the 500,000 Alleghany shares, the "assigned securities," in this way: Vaness delivered those bonds to the Van Sweringens who delivered them as "assigned securities" to the debtor in exchange for the Alleghany stock. The Van Sweringens, in turn, delivered to Vaness the non-negotiable obligation of the debtor for \$10,000,000. That obligation was pledged by Vaness to the banks which made the loan to it. \$5,000,000 of the loan to the debtor's subsidiary was used to purchase government bonds which, by arrangements between the debtor and the subsidiary (not necessary to describe here) were substituted for the 400,000 Alleghany shares theretofore constituting the "segregated assets." As a result of this and other transactions, the debtor, in addition to \$15,000,000 of "segregated assets" and "assigned securities" and all the stock of the subsidiary, also became the owner of an open account claim against the subsidiary in the amount of approximately \$27,000,000. The November 1, 1930 interest on the notes was paid out of the proceeds of the loan to Vaness. The only debts of the debtor consisted of the \$30,000,000 note issued the subordinated obligation [fol. 73] tion to the Van Sweringens, and a contingent liability for a maximum of \$4,000,000, as guarantor of an \$8,000,000 secured first mortgage bond issue of the subsidiary. As the record stands, on appeal from a summary judgment,

¹⁰ This loan was later increased to \$18,000,000.

² Defendant, in its brief in this court in *Hackner v. Morgan*, *supra*, so interpreted the maximum obligation under the guaranty.

there is no reason to believe that the debtor would ever have been called upon to pay anything on this guaranty.

During the summer of 1931, the debtor's outstanding notes fell in market value. The debtor, using part of the "segregated assets," purchased on the market some of those notes at fifty cents on the dollar and some at thirty cents on the dollar. By October 29, 1931, the debtor had thus purchased, for \$1,815,057.89, notes in the face amount of \$3,773,000. Had that process of buying in notes at fifty or less continued, the debtor, on acquiring \$15,000,000 of such notes, would have caused them to be cancelled; thereupon the remaining "assigned securities," having a cash value of at least \$7,500,000, could, under the unusual provision of the Indenture, be withdrawn by Vaness upon surrender to the debtor of its non-negotiable obligations. In that event the debtor and its creditors would lose any claim to that \$7,500,000, i. e., there would be \$7,500,000 less of assets available to the noteholders. The noteholders could then look only to the other assets of the debtor, which consisted of the shares of the debtor's subsidiary (which appear by that time to have become valueless) and the \$27,000,000 open account claim against the subsidiary on which, so the trustee then apparently believed, the debtor would probably never recover a sufficient amount to pay more than a relatively small portion of the face of its notes. At the same time, the \$7,500,000 withdrawn by Vaness, under the terms of its arrangements with the lending banks, would be paid to those banks on account of their loans to Vaness. [fol. 74] The defendant, the trustee, was fully aware of this situation. It also knew that another crisis was at hand. For it knew that the debtor had no funds with which to pay the third installment, due November 1, 1931, of interest on its notes; that the debtor's subsidiary could not supply those funds; that Vaness had no money or assets available for that purpose except \$300,000 of cash value of "assigned securities"; and that \$300,000 was sufficient to pay all the interest, which amounted to approximately \$728,000.³

³The Indenture did not permit the use of "segregated assets" for that purpose.

Had more than the \$300,000 "excess" of the "assigned securities" been so used (assuming without deciding, that

The trustee canvassed the possibility of liquidation proceedings against the debtor, since such proceedings would stop the process of buying in notes and would prevent the withdrawal by Vaness of "assigned securities" after the reduction of the note issue to \$15,000,000 which would result from such purchases if they continued. The affidavits presented by defendant on its motion for summary judgment, of the officers of the defendant and of Guaranty Company, strongly indicate that the trustee then believed that it could, and that in fact it then could, compel the debtor's liquidation in November 1931, because of the inability of the debtor to pay the November 1 interest installment due on the notes.^{3a} For, if default should then occur, the trustee would have the power, under the Indenture, to accelerate the maturity of the notes, thereupon to obtain a judgment for approximately \$27,000,000, and then, armed with that judgment, to cause the debtor's liquidation. [fol. 75] Moreover, because of the sharp drop in market value of the listed stocks owned by the subsidiary, and because of the serious reduction in the value of the subsidiary's other assets (consisting principally of mortgaged real estate), the investments of the debtor in the subsidiary (which constituted the debtor's only assets other than cash in the amount of about \$13,444,000) had become so reduced in value that the debtor was probably insolvent, i. e., the amount of its liabilities probably exceeded the value of its assets. Under the Delaware statutes, a receiver of a Delaware corporation which is thus insolvent may be appointed in that state at the suit of an unsecured creditor having no judgment. It may, then, be true that the trustee could have procured the appointment of a receiver for the debtor.^{3b} After such appointment, the trustee, under the Indenture permitted such use), there would, to that extent, have been a deficiency in such securities and the Van Sweringen brothers would have been obligated to repair that deficiency. The record more than suggests that they could not have done so.

^{3a} On the present record, it would seem that the \$500,000 loan, by Cleveland banks, made for that purpose could not have been obtained except as part of the offer plan described below.

^{3b} This fact may appropriately be canvassed at the trial.

Indenture, could have accelerated the maturity of the notes, quite apart from any default in payment of interest.³⁰

The trustee believed that liquidation proceedings, if then begun against the debtor, would almost surely precipitate insolvency proceedings against Vaness and the debtor's subsidiary. On the facts now before us, we cannot say that the trustee did not believe that such insolvency proceedings against the subsidiary would substantially reduce the recovery by the lending banks on their \$23,500,000 loan to the subsidiary. That loan was secured only by the subsidiary's listed stocks which then had a market value of only approximately \$8,200,000, leaving a deficiency of more than \$15,000,000. The trustee may have hoped that the market value of those listed stocks would rise to some extent so as to reduce that deficiency, and believed that, if receivership or bankruptcy of the subsidiary were then averted, its real estate would increase in value sufficiently to enable it to pay [60, 76] some of that deficiency and also to pay something substantial on its open account claim of \$27,000,000 held by the debtor.

On the facts as they now appear, if liquidation proceedings against the debtor had been instituted in 1931, all the noteholders would have received from the cash on hand at least from 42.2% to 49% of the face of their notes. For the debtor then would have had available for distribution among its creditors approximately \$13,444,000 of cash (or its equivalent) consisting of "segregated assets" and "assigned securities."³¹ The debtor's liabilities (ignoring the subordinated obligation to the Van Sweringens) consisted of outstanding notes, in the face amount of approximately \$26,227,000, and the contingent obligation previously described. Assuming that no actual obligation would have accrued on the contingent liability, there would have been available on liquidation proceedings, before deducting expenses, sufficient to pay in cash more than 51%

At the trial, it may also be appropriate to consider whether the facts were such that the trustee could successfully have procured the debtor's adjudication in bankruptcy.

This figure included the "excess" of about \$300,000 of "assigned securities." As to the inability to withdraw such excess after liquidation began, see footnote 1a, *supra*.

of the face of the notes. As the debt structure of the debtor was very simple, and as its assets other than cash and government bonds consisted solely of the stock of, and the open account claim against, its subsidiary, the expense of such a proceeding, we estimate, for present purposes, as not to exceed \$590,000.^{4a} On that basis, the debtor's liquidation would have yielded all the noteholders at least 49% in cash. Even if we assume that the debtor would have been obliged to meet the \$4,000,000 contingent liability in full, we estimate that the liquidation would have yielded, after expenses, about 42.2% in cash for all noteholders.⁵ [fol. 77] The trustee decided not to bring about the liquidation of the debtor. Instead, on or about October 29, 1931, the trustee, the debtor, Vaness, Morgan and the lending banks agreed upon a plan which we shall call the offer plan. Under this plan, all noteholders were paid the 3% interest on November 1, and were offered, in exchange for their notes, 50% of the face of the notes in cash and 20 shares of the debtor's stock for each \$1,000 note.^{5a} The offer was to remain open until December 1, 1931.^{5b} On October 29, \$26,227,000 face amount of notes were outstanding. By the terms of the offer plan, the first \$11,227,000 of notes thus acquired were to be cancelled, thereby reducing the note issue to \$15,000,000. Thereupon Vaness was to withdraw the remaining "assigned securities" consisting of about \$7,500,000 of cash (or its equivalent) and those monies were to be used, so far as necessary, to acquire further notes from those who accepted the offer. Such notes, being purchased by Vaness, were not to be cancelled but were to remain

^{4a} In order to be conservative, we use a highly generous figure here.

⁵ If, contrary to what we said in footnote 1a, the \$300,000 excess were not included in the assets available on liquidation, then the above estimated percentages would be reduced to approximately 47.7% and 41.1%, respectively. On that basis, deducting the 3% interest, the non-accepting noteholders lost, under the offer plan, from 38.1% to 44.7%.

^{5a} If all noteholders had accepted, they would have received in the aggregate 324,540 shares, leaving 1,419,260 or more than 80% in the hands of the lending banks as collateral. Thus the offer would not divest Vaness (or the banks as its pledgee) of voting control of the debtor.

^{5b} It was later extended to December 15.

outstanding, and to be delivered to the lending banks as additional collateral security for their loans. The \$300,000 of excess "assigned securities" was to be applied towards payment of the November 1 interest on the notes; the balance of the money necessary for that interest payment (estimated as "approximately \$500,000") was to be procured by a loan to the debtor by certain Cleveland banks. If, after the \$11,227,000 notes were cancelled, any noteholder did not accept the offer, so that, as a result some part of the \$7,500,000 was not used to purchase notes, it was to be applied by Vaness first in payment of that loan by the Cleveland banks and then on account of the \$1,280,000 [fol. 78] interest then due on the loan of the lending banks, no other funds for the payment of that interest being available. If there were not a sufficient balance of the \$7,500,000 to pay the Cleveland banks in full, then they were to be paid out of the first amounts realized by the lending banks on the debtor's uncanceled notes which the lending banks were to receive as collateral security under the plan. The lending banks agreed to release from their collateral so much of the stock of the debtor as might be necessary to carry out the terms of offers accepted by noteholders.

Those not-holders who accepted the offer would thus receive in cash 53%, i.e., 50% principal and 3% interest. Those who did not accept would receive merely the 3% interest in cash. Thus the offer plan gave accepting noteholders from 4% to 10.8%⁶ more in cash than they would have received in liquidation, i.e., 42.2% to 49%. But non-acceptors, receiving in cash only 3% interest, were, under the offer-plan, denied from 39.2% to 46% of the amount of cash they would have received on liquidation. As to the principal of their notes, they were left merely with a right to participate—as part of a class of holders of \$15,000,000 of notes—in whatever the debtor might subsequently realize on the open account claim against the subsidiary. In the next year, the non-accepting noteholders received an additional 6% by way of interest. This payment reduced their loss so that, regarding solely their loss of participation in the cash assets, they lost from 33.2% to 40%.^{6a}

⁶ Doubtless, too, they received this cash far more promptly than they would have received distribution via liquidation.

^{6a} Using the figures in note 5 *supra*, they lost from 32.1% to 38.7%.

If all the noteholders had accepted the offer, the only advantages to them over and above the results of liquidation, if then caused by the trustee, would have been the saving of the expense of such liquidation. (and perhaps the sharing in the \$300,000 excess). But the disadvantage [fol. 79] of avoiding liquidation to those who did not accept the offer would, so the trustee appears to have believed, be far greater. For the facts now before us strongly suggest that the trustee, while anticipating that, after the consummation of the offer-plan, there would be some recovery for the non-accepting noteholders, did not believe that such recovery, together with the interest they received, would amount to anything remotely approaching what they would have received on liquidation in 1931.

The trustee sent to the noteholders no information or advice concerning the offer plan. The written offer sent ~~by the~~ debtor to the noteholders was completely silent as to the existence of the loans by the lending banks, the participation of the defendant in such loans, the provision of the plan that those banks might receive part of the \$7,500,000 and part of the uncanceled notes, the loan by the Cleveland banks and the arrangements for the payment of that loan, the fact that as an alternative to the offer plan the trustee could have caused liquidation of the debtor; or an estimate by the trustee of what such liquidation would have yielded.

As matters worked out, the holders of all but \$1,213,000 face amount of notes accepted the offer. As a consequence, there were left outstanding \$15,000,000 of notes, of which \$13,784,000 were, under the offer plan, delivered to the lending banks as additional collateral security. Because holders of \$1,213,000 of notes did not accept, there remained, out of the \$7,500,000 withdrawn cash, the sum of \$606,000,* i. e., the 50% which would have been paid to the non-accepting noteholders if they had accepted the offer. Of this amount, approximately \$500,000 was, under the plan, payable and paid to the Cleveland banks. The lending banks,

* Other omissions from the offer will be noted below.

* In fact the withdrawn "assigned securities" amounted in cash value to approximately \$7,516,000, or an excess of some \$16,000 which is unexplained and which we ignore in these calculations.

[fol. 80] under the plan; were entitled to receive the balance of the \$606,000—i.e., \$106,000—to be applied on the interest on their loans. Morgan, on behalf of the lending banks, received that \$106,000, but (for reasons not appearing in the record) allowed Vaness to expend it for other purposes.⁹ Accordingly, the lending banks actually received \$106,000 which apparently they could not possibly have received had the trustee instituted liquidation proceedings against the debtor in 1931.

But the offer plan might have yielded the banks far more than \$106,000. For, of course, no one knew when the offer was made, how many noteholders would not accept. Had the holders of, say, \$3,500,000, failed to accept, then, out of the \$7,500,000, of cash, there would have been left \$1,750,000 of which (after paying the Cleveland banks,) the lending banks would have received not \$106,000 but \$1,250,000.

Nor can we say that the trustee did not then believe that, in addition to participation in some part of the \$7,500,000, the banks would receive other substantial advantages from the offer plan.¹⁰ For, at the time when the offer was made, the lending banks, including the trustee, were apparently confident that, if liquidation proceedings against the debtor did not occur and thereby insolvency proceedings against the subsidiary were prevented, the debtor would subsequently realize (on its open account claim against the subsidiary) a substantial sum. That they anticipated that this realization would be at least \$500,000 appears from the fact that the loan of the Cleveland bank could not be assured of payment unless that sum were thus realized since, if all the noteholders accepted the offer, the only source of payment of that loan would be such a realization of \$500,000. The [fol. 81] trustee knew that if a sufficient number of noteholders failed to accept, so that out of the \$7,500,000 enough cash remained to pay off the Cleveland banks, then the lending banks would, as pledgees, become the holders of at least (approximately) \$1,000,000 face amount of the \$15,000,000 notes left outstanding and that any such anticipated realiza-

⁹ Included in such expenditures was an item of approximately \$53,000 paid to the Cleveland banks for monies borrowed for purposes other than paying the November 1 interest; the plan did not provide for payment of such a loan out of the \$7,500,000.

¹⁰ We shall later discuss still other substantial advantages.

tion of at least \$500,000 would be paid, pro-rata, to the banks, as such holders of notes, and the non-accepting noteholders.¹⁰ Since the banks, as matters turned out, became the pledgee-holders of about 92% of those \$15,000,000 of notes, it follows that, if the anticipated minimum of \$500,000 had been realized, those banks would have received 92% of any such realization, or \$460,000, while the non-accepting noteholders would have received merely \$40,000, i. e., less than 4% of the face of their notes.

In fact, because of the subsequent difficulties of the subsidiary, nothing was thereafter paid on any of the outstanding notes except a payment of 6% interest in 1932. The non-accepting noteholders thus never received for their investment anything other than interest up to, and including, November 1, 1932 (i. e., interest for two and one-half years) and nothing whatsoever on the principal of their notes.

In April 1940, three of the noteholders who accepted the offer began an action against the defendant and Morgan, charging fraud and misrepresentation. Miss York, the plaintiff in the suit now at bar, subsequently tried to intervene in that action as a party plaintiff, but her intervention was denied. *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95 (C. C. A. 2; cert. den. 313 U. S. 559). For lack of claims in the requisite jurisdictional amount, the suit was also dismissed as to the original plaintiffs, but it was allowed to continue, under the name of *Hackner v. Morgan*, as to Miss [fol. 82] Eastman, an intervening accepting noteholder. In that suit, on defendant's motion, the district court entered a summary judgment for the defendants (43 Fed. Supp. 637) and we affirmed; *Hackner v. Morgan*, 130 F. (2d) 300 (C. C. A. 2, cert. den. 317 U. S. 691). In our opinion (based on the same affidavits, with one minor and unimportant exception, as those in the present record) we said that Miss Eastman had not shown that she suffered any loss, because had she not accepted, she would ultimately have received less than the 53% (that is 50% of the face of her notes plus 3% interest) which she obtained via the offer. We could have stopped there, but a majority of this court went on to

¹⁰ The lending banks, holding the greater part of the debtor's stock to secure a loan on which the interest was unpaid, presumably could have voted that stock and thus, controlling the debtor, could have compelled such payment.

say that, since there was no res, there was no trust, and that as, therefore, no breach of trust could exist, Eastman could not recover, even had a loss been proved.

Plaintiff, as the holder of notes of \$6,000 in face amount, began the instant suit, making sufficient allegations of diversity of citizenship, several months after she had been dismissed as plaintiff in *Hackner v. Guaranty Trust Co.*, *supra*. She sued on behalf of herself and other similarly situated noteholders who did not accept the offer, charging a breach by the defendant of its duties and obligations as a trustee and seeking an accounting. Both plaintiff and the defendant moved for summary judgment. On those motions, there were before the court the affidavits of George Whitney, one of the directors of the defendant, Arthur E. Burke, Vice President of the defendant, and Alfred Shriver, a Vice President of Guaranty Company.¹¹ The district court, relying on our statement in *Hackner v. Morgan*, held that, as here also there was no trust, no breach of trust could be found as a matter of "law," and therefore no basis for recovery existed, regardless of whether or not there was a loss. The district court accordingly entered summary judgment for the defendant.

[fol. 83] 2. In *Brooklyn Trust Company v. Kelby*, 134 F. (2d) 105, 116 (C. C. A. 2), decided after our decision in *Hackner v. Morgan*, we noted that, if the word "res" were translated as "thing," its vagueness might be more apparent, and that such a "thing" could be an intangible, as, for instance, a chose (thing) in action.¹² Subsequently, in *Clarke v. Chase National Bank*, 137 F. (2d) 797, 801 (C. C. A. 2), we held that, under a trust indenture, there could be a fiduciary relation with resultant fiduciary obligations, despite the absence of a res. We now add that where, as here, an indenture confers upon a trustee the power to

¹¹ Defendant also filed an affidavit showing that the banks realized nothing on the uncanceled notes of the debtor which they received as collateral.

¹² We cited suits, *quasi in rem*, under 28 U. S. C. A. Sec. 118, such as *Omaha National Bank v. Federal Reserve Bank*, 26 F. (2d) 884 (C. C. A. 8); *Reusselaer & S. R. Co. v. Irwin*, 252 F. 921; *Thompson v. Terminal Shares*, 89 F. (2d) 652 (C. C. A. 8); *Thompson v. Murphy*, 93 F. (2d) 38 (C. C. A. 8).

sue for noteholders and other powers, the trustee holds those powers in trust.¹³

We conclude, therefore, that the defendant here was a trustee with fiduciary obligations to the noteholders.

3. Accordingly, the principal issues here are these: Did the defendant, as trustee, fail to discharge its fiduciary obligations to the non-receiving noteholders? If so, then, as a result of such conduct, did they suffer a loss?

4. We have already seen that, on the basis of the facts now before us, the defendant, in November 1931, could probably have compelled the debtor's liquidation. As will appear from our discussion below, because of the exculpatory clauses of the indenture, the defendant, absent a showing of bad faith resulting from the presence of a substantial adverse interest, would not be liable for any loss to any noteholder resulting from its failure to cause that liquidation. [fol. 84] It becomes, then, a major issue whether such a substantial adverse interest existed. The record facts sufficiently suggest its existence to render erroneous the summary judgment for defendant, but do not sufficiently demonstrate its existence to justify our directing the entry of such a judgment for plaintiff. That a trial of those issues is necessary will appear from the following.

5. The defendant, in October 1930, although not legally obligated to do so, became one of the group of lending banks. As a consequence, if the process of purchasing notes, begun in 1931, continued, the defendant, as one of the lending banks was sure to receive a substantial financial benefit through the payment by Vaness of at least \$7,500,000 on the precarious loan to it made by those banks. The defendant, therefore, occupied a dual position: If it failed to take steps, using its powers as trustee, to protect the noteholders by stopping that process of note-buying, the defendant would certainly reap a marked advantage. In such circumstances, as we shall see, the exculpatory clauses of the Indenture could not serve as a shield from liability to noteholders who sustained a loss because of its failure to take such steps.

¹³ As we observed in *Clarke v. Chase National Bank*, the presence of exculpatory clauses serves to emphasize the existence of a trust.

We discuss the exculpatory clauses below.

Nor would the trustee be protected because it came to occupy that dual position (through its participation in the October 1930 bank loan) in all good faith, for the best of motives, and with no expectation that a sharp conflict would ever arise between the best interests of the noteholders and its own self-interest. Once that conflict occurred, defendant had the obligation either to disregard what might serve its self-interest or to resign as trustee.

The defendant did not resign but, instead of then bringing about the debtor's liquidation, acquiesced in an alternative—the offer plan. If (a) this plan involved no substantial actual or potential personal benefit to the trustee, or (b) if the facts were fully disclosed to the noteholders to whom the offer was made, so that any noteholder not accepting [fol. 85] could fully have understood such actual or potential advantages to the trustee and the probable consequences of not accepting the offer, then the trustee is not liable for the loss to those who did not accept.

On the facts now before us, we cannot say that the offer plan did not involve substantial actual and anticipated potential selfish advantages to the trustee, and did not create such an adverse interest as, absent full disclosure of the facts to the noteholders, imposed liability on it for losses to non-acceptors. For, as we saw, the plan, when agreed upon, was not at all unlikely to confer benefits on the trustee, as one of the lending banks, which it could not obtain if, as trustee, it caused the debtor's liquidation. Thus, as above noted, it was then obvious that, should the holders of \$3,500,000 of notes refuse the offer, the lending banks, under the plan, would receive \$1,250,000 not available to them on the debtor's liquidation. In fact, they did receive \$106,000 under the plan. Also the trustee knew that, under the plan, those banks would in all likelihood become holders of some of the uncanceled notes¹⁴ and that, if they did, they would subsequently share in the then anticipated minimum realization of \$500,000. Also, the trustee appears to have believed that the substitution of the offer plan for liquidation of the debtor would prevent receiverships or bankruptcy of Vaness and the debtor's subsidiary:

¹⁴ In fact, as we saw, they became the holders of about 92% of the outstanding notes.

if so, the plan would benefit the banks by preventing injurious effects on the loans by those banks to those companies.^{14a} [fol. 86] The defendant, which denies that it derived, or stood to derive, any benefits from the plan, argues, in the alternative, that if it received any such actual or potential benefits, it gave ample consideration therefor, since, had the offer plan not arrested the process begun in 1931, of buying and cancelling notes, the lending banks, including the trustee, would have received from Vaness at least \$7,500,000 of cash which Vaness would have withdrawn. But that argument lacks cogency because the defendant was not merely one of the lending banks. It was also a trustee which, as such, had the power, by forcing the debtor's liquidation, to prevent those banks from receiving any part of that \$7,500,000 to the detriment of any of the noteholders.

If, contrary to what we indicated above,^{14b} the \$300,000 excess in the "assigned securities" could have been withdrawn by Vaness after the institution of liquidation proceedings against the debtor, then that sum would have gone to the banks on liquidation. On that assumption, the banks under the offer plan gave up a right to \$300,000 and, therefore, the \$196,000 was not a benefit which they obtained by that plan. Even so, however, the plan, when agreed upon, was not unlikely to yield them other substantial advantages, above described, which could not have come to them on liquidation: They might well have obtained considerably more than \$300,000 through the plan, and the plan prevented receiverships of Vaness and of the subsidiary, with advantages to the banks of the kind above described.

The trustee could have blocked the offer plan by insisting on the debtor's liquidation. If, then, the trustee had de-

^{14a} The plan would leave the lending banks with voting control of the debtor; see footnotes 5a and 10. It would also probably give, and in fact did give, those banks more than 75% of the outstanding notes, thus preventing the non-accepting noteholders from procuring the demand by 25% necessary to compel action by the trustee against the debtor of a kind which would precipitate insolvency proceedings against Vaness and the subsidiary.

^{14b} See footnote 1a.

sired to avoid liquidation and, at the same time, to avoid, as far as possible, benefits to itself at the expense of those noteholders who would not accept the offer, it could, and would, have said to Vaness and the other lending banks that it would allow the plan to go through only if modified [fol. 87] as follows: The first payment, out of (a) any balance of the \$7,500,000 not needed to pay accepting noteholders and the Cleveland banks and (b) any subsequent realizations by the debtor, must be paid to non-accepting noteholders until they received at least 50% of the face of their notes,^{14c} and only then should anything be paid from either of those items to the lending banks.^{14d} Such a step would, on the facts before us, seem to be the least the trustee should have done to protect the non-assenting noteholders, although it may be doubted whether, on the facts as they now appear, such a modification of the plan would have purged the plan of impropriety by the trustee since, even thus modified, the plan would have benefited the lending banks by preventing the subsidiary's receivership. But even that step the trustee did not take.

In sum, the facts now before us (which may appear to be decidedly different after a trial) more than suggest that the trustee may have believed that, under the offer plan, non-accepting noteholders would receive very substantially less than they would have received through liquidation (which the trustee could then have compelled) and that the trustee may have known that it probably stood personally to gain substantial advantages, as one of the lending banks, which it could not obtain if such liquidation then occurred.

Of course, the courts should not impose impractical obligations on a trustee. Merely vague or remote possible selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question. But here the advantages seem not to have been thus

^{14c} Or, at least as much as they would have received on liquidation, using some reasonable estimated figure.

^{14d} If the lending banks were entitled to the \$200,000 "excess," then it would have been proper to provide that they should receive that sum before any payments were made to non-accepting noteholders.

[fol. 88] vague or remote.¹⁶ That a trustee owes his beneficiaries undivided loyalty entirely untinged by considerations of any important benefits to himself is an old truth, and one whose edge cannot be dulled by frequent use.^{15a} If the trustee here allowed its judgment to be affected by any such factors, it acted improperly. Cf. *Pepper v. Litton*, 308 U. S. 295, 311. If it failed to exercise the powers it held in trust because it entertained a belief that such inaction might be to its own substantial benefit (while failing to consider the consequent harm to any of its beneficiaries), then it breached its obligations, regardless of whether its belief, objectively viewed, was illusory. That is to say, the

¹⁵ Our comments in *Irwin v. Simmons*, 140 F. (2d) 558, 560-562 (C. C. A. 2), are not in point here. For defendant here is a trustee repeatedly designated as such in the notes and the indenture. The indenture vests in the trustee all rights of action; it provides that such actions shall be brought "in its name as trustee," and that the trustee "in its name and as trustee of an express trust" shall be entitled to sue for collection of all amounts due the note-holders.

^{15a} Chief Justice Stone has said that this principle embodies "the precept as old as Holy Writ, that 'a man cannot serve two masters' * * * No thinking man can believe that an economy built upon a business foundation can long endure without loyalty to that principle." Stone, *The Public Influence of the Bar*, 48 Harv. L. Rev. 1, 8.

In *Bayer v. Bevan*, N. Y. L. J. April 20, 1944, Mr. Justice Shientag said: "The fiduciary has two paramount obligations: responsibility and loyalty * * * They lie at the very foundation of our whole system of free private enterprise and are as fresh and significant today as when they were formulated decades ago * * * While there is a high moral purpose implicit in this transcendent fiduciary principle of undivided loyalty, it has back of it a profound understanding of human nature and of its frailties. It actually accomplishes a practical beneficent purpose. It tends to prevent a clouded conception of fidelity that blurs the vision. It preserves the free exercise of judgment uncontaminated by the dross of divided allegiance or self-interest. It prevents the operation of an influence that may be indirect but that is all the more potent for that reason."

trustee should be held liable^{15b} if the trial court reasonably infers from the evidence at the trial that the trustee, [fol. 89] in making its decision, was moved to do so in any degree by the thought that it might incidentally secure a substantial advantage to itself. In such circumstances, nothing would turn on the fact that the trustee did not in fact derive benefits, if its inactivity caused loss to any of its beneficiaries. Nor is it relevant that the great majority of the beneficiaries fared better through such inaction. The trustee owed an equal duty to all its beneficiaries; cf. Restatement of Trusts, s. 183. Those who suffered have a right to demand that the trustee put them in the financial position which they would have occupied; and it acted for the equal benefit of all. If the trustee is liable here, the measure of its liability is the loss suffered by the non-accepting noteholders, not the benefits derived by the trustee.

6. Even if, however, the plaintiff on the trial, proves that the trustee stood to gain substantially from its inaction (or thought that it did) and that the non-accepting noteholders lost by that inaction, the trustee will have a good defense if it proves that a full disclosure of the pertinent facts was made to them before the offer expired on December 15, 1931. We are not to be taken as holding that in all circumstances a trustee with an adverse interest can exculpate himself by disclosure to his beneficiaries; we limit that ruling to the facts of this case as they now appear. On the record, as it now stands, we cannot say that the requisite disclosure was made.

We turn first to the terms of the offer.^{15c} It stated the amount of notes outstanding and the amount of cash available. It disclosed that the Indenture permitted the Van [fol. 90] Sweringen brothers to withdraw all "assigned securities" after \$15,000,000 of notes were retired; that the debtor believed that the offer would be "mutually bene-

^{15b} Subject to the qualifications noted later in this opinion.

^{15c} The offer, signed by the debtor, was sent by the debtor or by investment bankers to the noteholders. There is nothing, we repeat, in the record to show that the trustee gave the noteholders any data or advice concerning the offer.

“ficial” to accepting noteholders and to the debtor; that the November 1, 1931 interest would “be paid in the usual way on presentation” of coupons; and that, under the offer plan, notes purchased after the retirement of \$15,000,000, would be acquired “not by the corporation but by the Van Sweringen interests,” and would “remain outstanding on a parity as obligations” of the debtor with notes held by non-accepting noteholders. The offer also stated that acceptors would receive not only 50% in cash (in addition to 3% interest) but would receive some of the shares of the debtor. Nothing whatever was said in the offer to indicate that these shares were virtually without value, although such appears to have then been the belief of the trustee.

If the shares of the debtor thus offered to the accepting noteholders, had any value whatever, then, even after the acceptance of the offer by enough of the noteholders to permit the cancellation of \$15,000,000 of notes and the withdrawal of all the remaining cash (i. e., \$7,500,000), the remaining assets of the debtor must have been sufficient to pay all the non-accepting noteholders in full, for, otherwise, the stock would be worthless. Consequently, the offer of those shares to accepting noteholders might have led the ordinary wayfaring noteholder to believe that, if he did not accept the offer, the debtor's assets would be ample to pay him one hundred cents on the dollar. Thus the offer, on its face, did not in any way disclose the difficulties which the trustee then thought were in store for a non-accepting noteholder.

The defendant, however, argues that the noteholders were put on notice that the debtor's shares at that time lacked value, because the offer advised them that balance-sheets of the debtor and its subsidiary would “be furnished on request.” We assume, *arguendo*, that this statement [fol. 91] served to give all the noteholders all the information they would have gleaned had they called for and read those balance-sheets. Any noteholder who did so, would have seen that the debtor apparently had \$69,000,000 of assets to cover both the \$26,246,000 of notes (plus interest thereon) and the contingent liability of not to exceed \$4,000,000, or far more than enough assets, aside from the cash on hand, to meet all its debts (disregarding the subordinated obligations to the Van Sweringens). Put on notice of those facts, the noteholder would still have assumed that, if he refused the offer and if all the cash then

on hand were paid out, he would be no worse off than if he accepted the offer.

The defendant correctly asserts that a close study of the balance-sheets would have revealed the worthlessness of the debtor's shares.^{15d} But we cannot agree with defendant that such a study would also have shown that one who did not accept the offer would not be nearly as well off as one who did. The debtor's balance-sheets showed that among its assets were the shares of its subsidiary carried on the debtor's balance-sheet at cost, or approximately \$29,000,000. Alongside this figure, a notation advised that it was based on book-values of the subsidiary's real-estate and of the cost of securities owned by the subsidiary, without giving effect to "adjustment in market values of listed securities owned by subsidiary," in this connection calling attention to the balance-sheet of the subsidiary.

Turning now to the subsidiary's balance-sheet, it showed that, among its assets, were "listed stocks" carried at cost, or approximately \$37,200,000. A footnote showed that these stocks, pledged to secure a \$23,500,000 note, had on September 30, 1929, been worth approximately \$93,000,000; on September 30, 1930, approximately \$38,000,000; and, that on September 30, 1931 (the date of the balance-sheet) they had a market value of only (approximately) \$8,200,000. Here was a disclosure that these securities, at then market values, were worth approximately \$29,000,000 less than their cost. The subsidiary's total assets were shown as approximately \$103,000,000, so that, deducting the \$29,000,000 shrinkage in the listed stocks, the subsidiary's assets appeared to be about \$74,000,000. Against this asset figure, were shown liabilities aggregating approximately \$76,000,000. A noteholder who sent for, and carefully read, the balance-sheets would, then, have seen that, on the basis of the then low market values of the listed stocks owned by the subsidiary, the debtor's shares were worthless and that the investment of the debtor in the shares of the subsidiary—approximately \$29,000,000—had no value.

^{15d} In making that contention, defendant is driven to admit that the offer was misleading since it included an offer of shares hopelessly without value, unaccompanied by a clear explanation of that fact. The defendant, on the facts before us, did nothing to aid the noteholders to discover that fact.

On the other hand, although the subsidiary's debts were shown to exceed its assets, yet, according to the balance-sheet the proportion of assets to debts was such that the debtor's \$27,000,000 open account claim against the subsidiary appeared to be worth at least \$15,000,000.^{15c} On that basis, after the offer plan was consummated, the debtor would have sufficient assets to pay the full face of its then outstanding \$15,000,000 of notes; even if the debtor were [fol. 93] liable in full, on its \$4,000,000 contingent liability, so that its liabilities would be \$19,000,000, it would have enough assets to pay more than 78% on the face of those notes. A notekholder might, therefore, reasonably have thought that he would be no worse off if he did not accept the offer.

Nothing in the offer intimated in any way that serious shrinkage in the value of the subsidiary's real estate assets of which the trustee, according to the affidavits filed by it, then had a lively awareness. No adequate warning of this fact was given by the notations, in the subsidiary's balance-sheets, that its land and building were carried at cost or on the basis of appraisals. True, attached to the balance-sheet was an income statement, for the first nine months of 1931, which showed a net loss for that period (after deducting depreciation) of approximately \$1,633,000. This loss (resulting from an excess of operating expenses, taxes and fixed charges over rentals received) would serve to indicate that there was a lack of net earnings on the improved real estate of the subsidiary for the preceding nine months. But that fact would not alone seem sufficient to suggest that so much of the subsidiary's assets as consisted of real estate had so seriously shrunk in value as to reduce the value of the \$27,000,000 open ac-

^{15c} If the figure of \$37,200,000, representing the listed stocks, were deducted from the assets, but the entire \$23,500,000 note secured by those stocks were still included in the liabilities, there would be assets of about \$65,000,000 to cover about \$76,000,000 of liabilities (including the liability on the \$27,000,000 open account owing to the debtor). Those figures indicated that the open account claim was worth about \$23,000,000. We shall not here attempt a nicer analysis but, in order to be conservative, we assume that the open account claim appeared, from the balance-sheet, to be worth at least \$15,000,000.

count claim owing to the debtor to less than, say, \$14,000,000, i. e., a sum more than sufficient to yield 53% of the notes which would be outstanding if the offer transaction were carried out (even assuming that the debtor would be held fully liable on the \$4,000,000 contingent liability).

Accordingly, on the facts now before us, there was no adequate disclosure to a noteholder that, in the trustee's opinion, if he did not accept the offer and other noteholders did accept in a sufficient amount to reduce the note issue to \$15,000,000, in all probability he would recover very substantially less than if he accepted. Nor was he told [fol. 94] that liquidation of the debtor presented an alternative to the offer plan¹⁶ but that such liquidation, in the opinion of the trustee, would be somewhat less advantageous to him than acceptance of the offer but far more advantageous than its rejection. Nor was there a syllable to suggest that the trustee was one of a group of banks which had loaned large sums to the debtor's parent, Vaness, and to the debtor's subsidiary; that, under the offer plan, those lending banks, including the trustee, might reap substantial advantages which they would never obtain if the debtor were liquidated through proceedings then begun; and that, inter alia, those notes purchased under the offer plan which were not to be cancelled would be received by those banks as collateral.

We think that in the circumstances (assuming that the trustee had a substantial adverse interest), it could have avoided liability for loss to the non-accepting noteholders only by a disclosure, in clear terms, of the nature of that interest, of the alternative of liquidation together with a statement of what the trustee regarded its probable consequences, and of facts showing why, in the trustee's opinion, the acceptance of the offer promised to be more beneficial to noteholders than its rejection. On the present record, nothing like such a disclosure was made. If, then, the plaintiff, at the trial, proves that the defendant was in any degree actuated by a substantial adverse interest and the defendant fails to adduce evidence of a more adequate

¹⁶ As a matter of fact that alternative had disappeared on November 14, 1931, about two weeks after the offer was made; for by that date, as enough notes had been bought and cancelled, the note issue was reduced to \$15,000,000 and, accordingly, Vaness then withdrew the \$7,500,000.

disclosure than that contained in the offer, balance-sheets and income statement, plaintiff must win.

Had the trustee in 1931 caused the debtor's liquidation, the liquidation of the subsidiary (so defendant's affidavits more than suggest) would soon have followed. There [fol. 95] might have resulted a substantial recovery on the open account claim against the subsidiary. While it is arguable that that recovery, on the facts before us, would perhaps not have yielded the noteholders an amount which, together with their participation in the cash assets then in the debtor's hands, would have equalled the 53% offered under the plan, it might well have given them in excess of 50%, although apparently the trustee did not think so. What that recovery might have been, no one now can estimate with any high degree of accuracy. But, if defendant wrongfully failed to bring about that liquidation, it cannot avail itself of the resulting difficulty of making that estimation. "The wrongdoer is not entitled to complain that" the damages "cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise," for "the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." * * * *Story Parchment Co. v. Patterson Co.*, 282 U. S. 555, 563, 564-565.¹⁸

7. Defendant in its petition for rehearing for the first time asserted that, on the face of the complaint, it appears that the court lacks jurisdiction because plaintiff's claim, exclusive of interest and costs, does not exceed \$3,900. That contention requires defendant to show that it is a "legal certainty" that the plaintiff's claim is below the required figure. See *St. Paul Indemnity Co. v. Cab Co.*, 303 U. S. 283, 288-290, and cases there cited. The absence of such a "legal certainty" is indicated by the fact that, until it filed its rehearing petition, defendant did not even suggest that defense.

[fol. 96] It is true that, if defendant's loss related solely to the loss of participation in the cash assets which would

¹⁸ See also, *Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co.*, 155 F. 114, 115 (C. C. A. 6) cert. den. 207 U. S. 590; *Lincoln v. Orthwein*, 120 F. 880, 886 (C. C. A. 5); *Package Closure Corp. v. Sealright Corp.*, — F. (2d) — (C. C. A. 2, April 3, 1944); cf. *F. W. Woolworth v. N. L. R. B.*, 121 F. (2d) 658, 663 (C. C. A. 2).

have been available for distribution had liquidation occurred in 1931; her claim would probably not be in excess of \$3,000.¹⁹ But, as we have said, she suffered an additional loss of participation in what might have been recovered on the open account claim against the debtor's subsidiary, if liquidation had then occurred. That loss is of such a character that, when added to the loss of participation in the cash, it cannot be said that it is a legal certainty that plaintiff's claim is for less than \$3,000.

Defendant urges that, if we conclude here that plaintiff's claim is for more than \$3,000, our conclusion will be inconsistent with what we said as to the amount of recovery in *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95 and *Hackner v. Morgan*, 130 F. (2d) 300. For reasons which we need not here set forth, we think there is no such inconsistency. But, assuming arguendo that there is, yet we are not bound here to abide by our previous conclusion, if, when upon a

¹⁹ However, it might be said that, in computing the amount of plaintiff's claim, interest may be included. Interest on her notes is represented by matured coupons, and such interest could be added for jurisdictional purposes in an action against the debtor. *Edwards v. Bates County*, 163 U. S. 269. Perhaps that decision should be disregarded here, since it might be urged that plaintiff is not suing on her notes and coupons as such but is proceeding against the trustee for a loss which plaintiff suffered, measured by the amount which she could have recovered from the debtor but for defendant's wrongdoing. Even so, there could well be considered the doctrine of *Broien v. Webster*, 156 U. S. 328, i. e., that in an action for a tort there is to be included, in computing the jurisdictional amount, interest which forms part of the damages and which therefore becomes "an essential ingredient in the * * * principal claim."

* * * See also *Springstead v. Crawfordville State Bank*, 231 U. S. 541, 542; *Chesbrough v. Northern Trust Co.*, 252 U. S. 83; *Chesbrough v. Woodworth*, 251 F. 881, 883 (C. C. A. 6); *Central Commercial Co. v. Jones-Dusenbury Co.*, 251 F. 13, 17 (C. C. A. 7); *Intermela v. Perkins*, 205 F. 603, 606 (C. C. A. 9); *Nathan v. Rock Springs Distilling Co.* 10 F. (2d) 268 (C. C. A. 6); *Simecek v. U. S. National Bank of Omaha*, 91 F. (2d) 214, 217, 218 (C. C. A. 8).

searching examination of the facts, it appears to us to be [fol. 97] incorrect; even if the statements in our earlier opinions were the "law of the case," we would not be obliged to stand by them when convinced of their error.²⁰

8. It has been suggested, however, that our decision as to plaintiff's attempted intervention in *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95 (C. C. A. 2) is an adjudication that the amount in controversy is not in excess of \$3,000 and that therefore the court below, the very court in which *Hackner v. Guaranty Company* was brought, lacked jurisdiction here. In *Hackner v. Guaranty Trust Co.*, the action was begun by noteholders who had accepted the offer and who sought recovery against Guaranty Trust in deceit because of alleged false representations which induced them thus to accept. None of the noteholders who instituted that action had a claim in the jurisdictional amount. Plaintiff endeavored to intervene. On motions by defendants to dismiss the complaint and deny the intervention, the district court, on the pleadings, entered judgment for the defendants and we affirmed. Miss York's attempted intervention in that suit, based upon deceit, should be regarded, and was indeed by us there regarded, as, in effect, an action by her for recovery on the ground of deceit inducing her acceptance of an offer which in fact, according to her petition of intervention, she had not accepted. We there decided that, although she held notes in the amount of \$6,000, her claim, on the facts alleged, was for not more than \$3,000 and, on that ground, we held that she had been properly denied intervention. That decision on the pleadings in such an action was ~~not an adjudication~~ that, in a suit based on a different theory—i. e., the defendant's breach of its fiduciary obligations in not causing the debtor's liquidation—[fol. 98] her claim was not for the requisite amount.²¹

²⁰ See *Messenger v. Anderson*, 225 U. S. 436, 444; *Richls v. Margolies*, 279 U. S. 248, 220 *et seq.*; *Cadillac Motor Car Co. v. Johnson*, 261 F. 878 (C. C. A. 2); *Hammond-Knoulton v. U. S.*, 121 F. (2d) 192, 205 (C. C. A. 2).

²¹ Cf. discussion of res judicata in *Southern Pacific Railway Co. v. Bogert*, 250 U. S. 483, 490-491.

This too should be noted: As appears from *Ripperger v. A. C. Allen*, 113 F. (2d) 332 (C. C. A. 2) and *Smith v. McNeal*, 109 U. S. 426, a prior decision dismissing a suit

9. Defendant also relies on the exculpatory clauses of the indenture.²² The provision that the "trustee may advise with counsel * * * and shall be fully protected in respect [fol. 99] of any action taken or suffered * * * in good

on the mere pleadings for lack of jurisdiction is not a bar to a second suit alleging sufficient jurisdictional facts which existed when the first suit was pending but which were not therein alleged. Cf. *Wiggins Ferry Co. v. O. & M. Railway*, 142 U. S. 396, 410; *Sylvan Beach v. Koch*, 140 Fed. (2d) 852, 860 (C. C. A. 8); *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 F. 313, 318 (C. C. A. 6). It is by no means clear that the facts alleged in *Hackner v. Guaranty Trust Co.* bearing on plaintiff's participation in the recovery from debtor's subsidiary are substantially similar to those which appear in the present record if we include defendant's affidavits. If necessary, plaintiff could amend, either here or in the district court, when the case is remanded, to include in her complaint that portion of the facts contained in defendant's affidavits bearing on her participation in such recovery. 28 U. S. C. A. § 777; F. R. C. P. 15(c); *Smith v. McCallough*, 270 U. S. 456, 460; *Realty Holding Co. v. Donaldson*, 268 U. S. 398, 400; *Norton v. Larney*, 266 U. S. 511, 516; *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76; *Kinney v. Columbia Savings & Loan Assn.*, 191 U. S. 78, 83; *Thompson v. Automatic Fire Protection Co.*, 151 F. 945; *Whalen v. Gordon*, 95 F. 305, 307 (C. C. A. 8); *In re Plymouth Cordage Co.*, 135 F. 1000, 1003 (C. C. A. 8); *Gregg v. Gier*, Fed. Cas. No. 5, 799; *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 576; *Atwood v. National Bank of Lima*, 115 F. (2d) 861, 863 (C. C. A. 6); *N. Y. Cent. R. R. v. Kinney*, 260 U. S. 340, 346; *Matty v. Grasselli Co.*, 303 U. S. 197, 200-201; *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 68-69.

But, for the reasons stated in the text, while it is perhaps desirable that plaintiff should thus amend when the case is remanded, such an amendment is not necessary to avoid defendant's *res judicata* argument.

²² Each note expressly refers, six times, to the defendant as "trustee." There is not a syllable in the notes suggesting that the trustee is to be immunized from the usual obligations of a trustee, but the notes state that they are is-

faith in accordance with the opinion of such counsel," has no application here, for no facts are shown indicating that, in failing to cause liquidation and in participating in the offer plan without full notice to all noteholders, the defendant acted on advice of counsel. The provisions that the trustee might purchase or own or hold any of the notes and "assert its rights in respect thereof in the same manner as any other noteholder," and engage in any financial transaction with the debtor or any corporation in which the debtor may be interested, did no more here than permit defendant to become a noteholder and a creditor of the debtor's subsidiary. It did not authorize defendant, when in that position, to subordinate the interests of any of the noteholders to its own.

Defendant stresses the provision that the trustee shall not be "answerable . . . for anything whatever in connection with this trust except for its own wilful misconduct," and cites New York decisions said to be pertinent here. We cannot agree. The case on which defendant chiefly relies is *Hazzard v. Chase National Bank*, 159 Misc. 57 (aff'd, 257 App. Div. 950, 282 N. Y. 652), where the trust indenture provided that the trustee should not be answerable "under any circumstances whatsoever, except for its own gross negligence or bad faith." The trustee had made large unsecured loans to the obligor, its officers, and affiliated companies. The indenture permitted the obligor to withdraw securities pledged with the trustee and to substitute others provided the earnings, applicable to pay the interest under the indenture from all the securities remaining on deposit with the trustee after the substitution, for a certain period preceding the application for substitution, was at least twice the interest requirements for a period of one year. The plaintiff contended that the defendant was guilty of bad faith in permitting certain substitutions; it argued that the purpose of the

sued "under and pursuant to an Indenture . . . to which . . . reference is hereby made for a description of the terms on which such notes are issued and of the rights of the Trustee and of the holders of the notes under said Indenture. . . . While the average noteholder, we know, as a matter of common knowledge, never reads such an indenture, yet all the noteholders are bound by its terms so far as they are valid.

[fol. 190] trustee in permitting them was to enable the obligor to use the withdrawn collateral for the purpose of meeting the interest requirements on the debentures secured by the indenture, thus preventing the otherwise inevitable default in the payment of this interest in order to keep the obligor alive for six months during which time the trustee would be able to collect or protect its loans to the obligor and affiliated companies and to the officers of the obligor. The Court found as a fact that the plaintiffs had "not sustained the burden of proving that the trustee sought to obtain profit for itself at the expense of its debenture-holders by its action in allowing the substitution, or that it was actuated in any way by bad faith." It found that the purpose of the withdrawal, so far as the trustee was concerned, was the furtherance of an expansion policy of the obligor and its affiliated companies and that there was "nothing to show" that the trustee "had any knowledge of any insincerity in these alleged * * * policies." On the facts, the Court also found that the trustee was not guilty of gross negligence. In the instant case, the issue is not that of defendant's negligence but whether defendant was guilty of "wilful misconduct" which we take to be the equivalent of "bad faith." The *Hazzard* case, where the findings of fact on that issue turned on the particular record evidence, has no precedential force here.²³ For

²³ In *Benton v. Safe Deposit Co.*, 255 N. Y. 260, a suit against a trustee under a mortgage executed in Pennsylvania which provided that the trustee should not be liable "save for its gross negligence or wilful default," and that it "shall be no part of the duty of the trustee to record this instrument," the mortgage not having been recorded and the notes not having been paid, a noteholder sued the trustee for the resulting loss. The Court, finding that under Pennsylvania decisions a trustee in such circumstances would not be liable, held for the defendant, saying that there was no such fundamental injustice in the exculpatory clauses as to forbid enforcement of them in New York, as against the State's public policy. The Court, quoting from a Pennsylvania decision that such a noteholder could easily have learned of the non-recording, said, "The plaintiff could have ascertained all the facts upon inquiry; nothing was hidden or concealed." In *Savings Bank of New Lon-*

here, on the facts now before us (which, we repeat, must be [fol. 101] canvassed after a trial); it may appear that the defendant knowingly failed to take action and by so doing injured plaintiff, although defendant knew that such inaction and the concomitant plan would probably operate to the defendant's own substantial advantage.

10. The parties stipulated that plaintiff's notes "were originally acquired by the firm of Warren W. York & Company" and that "on April 19, 1934, the plaintiff received said notes as a gift and she has been the owner and holder thereof since that date." Defendant made nothing of these facts in the court below nor here until it filed its petition for rehearing. Then it urged that, under New York decisions,²⁴ only the person who owned the notes at the time when the breach of trust occurred can maintain an action because of such breach since the action does not involve any charge of releasing any trust assets on which the notes were [fol. 102] a lien. The New York cases seem so to hold. But they recognize that the cause of action may be specifically assigned.²⁵ If plaintiff here obtained her notes upon the dissolution of the firm, such an assignment to her may have

don v. New York Trust Co., 27 N. Y. S. (2d) 963, the indenture provided that the trustee should not be "answerable or accountable under any circumstances except for bad faith." The trustee released part of the mortgaged property without receiving in return the money received by the mortgagor for such property. The Court held that the trustee was grossly negligent but that, on the facts before it, there was no showing of bad faith. In *Ausbacher v. New York Trust Co.*, 280 N. Y. 79, the court held that, on the particular facts stated in the pleadings, the trustee was not guilty of gross negligence or bad faith; those facts are wholly unlike those before us. On its facts, *Greenx Title Guarantee & Trust Co.*, 223 App. Div. 12, is not in point.

²⁴ *Elkind v. Chase National Bank*, 259 App. Div. 661, aff'd, 284 N. Y. 726; *Emmerich v. Central Hanover Bank & Trust Co.*, 291 N. Y. 570; *Hendry v. Title Guaranty & Trust Co.*, 225 App. Div. 497, aff'd, 280 N. Y. 740; *Doyle v. Chatham & Pheenix National Bank*, 253 N. Y. 369; *Smith v. Continental Bank & Trust Co.*, N. Y. (April 6, 1944).

²⁵ *Smith v. Continental Bank & Trust Co.*, *supra*.

been implied in fact. At any rate, on a motion for summary judgment, we cannot hold that she did not acquire the notes by an actual assignment, express or implied in fact. When the case is remanded, plaintiff may amend to set forth the actual facts concerning the assignment, and of course defendant will be at liberty to try to show that there was no express assignment or none implied in fact.²⁶

11. Plaintiff alleges in her complaint that she did not learn of the trustee's participation in the 1931 offer plan until "the middle of 1940" when she sought to intervene in the *Hackner v. Guaranty Trust* action. As previously noted, an order denying her intervention in that action was affirmed by this court. That action terminated as to her on April 7, 1941, when certiorari was denied in 311 U. S. 559. She began the present suit on January 22, 1942.

Defendant argues that, because of *Eric R. Co. v. Tompkins*, 304 U. S. 64, we must apply the New York statute of limitations as construed by the New York courts; that this action, if brought in a New York court, could have been brought at law; that it is therefore barred by the New York six-year statute, Civil Practice Act § 48 subdivision 3 relating to such suits; that, if it be considered as being exclusively within the equity jurisdiction, it is nevertheless barred by the ten-year provision of § 53 of that Act which the New York courts have held applicable to equity suits of that kind; that the New York courts have decided that, under § 53, the statute is not tolled even if, because of defendant's misconduct, plaintiff was in ignorance of her rights until after the lapse of the ten years; that the only provision of the New York statute which makes allowance for such ignorance is subdivision 5 of § 48 which relates

²⁶ This disposition of defendant's contention renders it unnecessary to consider the following suggestion: Restrictions on the bringing of stockholders' actions, such as those imposed by F. R. C. P. 23(b) or state statutes, are procedural [cf. *Piccard v. Sperry Corp.*, 120 F. (2d) 328 (C. C. A. 2, affirming 36 F. Supp. 1006); *Galdi v. Jones*, — F. (2d) — (C. C. A. 2, April 4, 1944); *Towner-Hill Connellsville Coke Co. v. Piedmont Coal Co.*, 64 F. (2d) 817, 828 (C. C. A. 4, cert. den. 290 U. S. 675)], and the restriction imposed by the New York courts on suits by assignees of notes is similar.

solely to "an action to procure a judgment on the ground of fraud," and that the New York courts have interpreted that section to apply exclusively to actions for deceit and the like. In short, defendant contends that, under New York law, and therefore in a federal court sitting in New York, a suit by a beneficiary against a trustee for breach of trust, unless it is the equivalent of an action for deceit, is barred at least after ten years, regardless of the fact that, due to the trustee's inequitable conduct, the beneficiary was ignorant of the cause of action until after the fixed statutory period. Assuming, arguendo, that defendant's interpretation of the New York decisions is correct, we reject defendant's contention for the following reasons.

Beginning in 1818 with Chief Justice Marshall's opinion in *Robinson v. Campbell*, 3 Wheat. 212, 222,²⁷ the Supreme Court has repeatedly held that, while as to substantive rights, a federal court sitting in equity, in a suit where jurisdiction rests on diversity of citizenship, must apply state statutes and, usually, state decisions, yet it need not do so with respect to equitable "remedial rights."²⁸

²⁷ In *Robinson v. Campbell*, *supra*, the Court, explaining this doctrine, said: "In some states in the Union, no court of chancery exists, to administer equitable relief. In some of those states, courts of law recognise and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in other, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice, in all its extent, would at once extinguish in such states, the exercise of equitable jurisdiction."

²⁸ The progeny of *Robinson v. Campbell* are legion. See, e. g., *U. S. v. Howland*, 4 Wheat. 108, 115; *Boyle v. Zacharie*, 6 Pet. 532, 648, 658; *Livingston v. Story*, 9 Pet. 532, 537; *Neves v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430; *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130; *In re Sawyer*, 124 U. S. 200, 209-210; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204; *Guffey v. Smith*, 237 U. S. 110, 114; *Pusey & Jones v. Hansen*, 261 U. S. 49; *Henrietta Mills v. Rutherford*, 281 U. S. 121, 127; *Atlas Ins. Co. v. Southern Co.*, 306 U. S. 563, 568; *Sprague v. Ticonic Bank*, 307 U. S. 161, 146; cf. *Mason v. U. S.*, 260 U. S. 545, 557-558.

As to substantive rights, beginning in 1842—twenty-four years after *Robinson v. Campbell*—with *Swift v. Tyson*, 16 Pet. 1, the Court held, until recently, that the federal courts, in diversity cases, must follow state decisions except where there is no pertinent state statute and where a question of “general law” is involved. *Swift v. Tyson* was a suit at law, and its ruling was founded upon an interpretation of the so-called Rules of Decision Act, being § 34 of the Judiciary Act of 1789, now 28 U. S. C. A. § 725. That section, by its terms, applies only to suits at common law; but it has been held to be merely declaratory of the rule which would obtain even in the absence of such a federal statute and which therefore governs in equity as well as at law.²⁹

Eric v. Tompkins came to destroy the exception created by *Swift v. Tyson*, and did so both in law and equity suits.³⁰ But it did not purport to, and it did not, in any way alter the wholly distinct doctrine relating to equitable “remedial rights”³¹ which rests on § 11 of the Judiciary Act, now 28 U. S. C. A. § 41(1), conferring equity powers on the federal [fol. 405] courts.³² There can be no doubt that today, as

²⁹ *Mason v. U. S.* 260 U. S. 545, 559 and cases there cited.

³⁰ *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202.

³¹ See, e. g., *Kelteam v. Maryland Casualty Co.*, 312 U. S. 377; cf. *Sprague v. Ticonic Bank*, 307 U. S. 161; *Atlas Ins. Co. v. Southern Co.*, 306 U. S. 563.

³² In *Atlas Ins. Co. v. Southern Co.*, 306 U. S. 563, 568, the court, referring to this section, said: “This provision is perpetuated in § 24(1) of the Judicial Code, 28 U. S. C. § 41(1), which declares that the district courts shall have jurisdiction of such suits. The ‘jurisdiction’ thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne v. Hook*, 7 Wall. 423, 430; *In re Sawyer*, 124 U. S. 200, 209-210; *Matthews v. Rodgers*, 284 U. S. 521, 525; *Gordon v. Washington*, 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts, as federal courts, in the sense of their power or authority to hear and

before *Eric v. Tompkins*, a federal court sitting in a given state will, for instance, refuse to appoint a receiver at the suit of an unsecured creditor although the statute of that state authorizes such an action,³³ or will grant equitable relief to a lessee under an oil and gas lease containing a clause giving the lessee an option of surrender although the court refuses such relief.³⁴

[fol. 106] The point of this discussion is that it has often been held that, for the purposes of this doctrine, state statutes of limitations are to be regarded in the federal courts as affecting not substantive rights but merely equitable "remedial rights."³⁵ The Supreme Court so held in the leading case of *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, an equity suit brought in the federal district court in

decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity."

³³ *Pusey & Jones v. Hanssen*, 261 U. S. 491; *Kelbeam v. Maryland Casualty Co.*, 312 U. S. 377.

³⁴ *Guffey v. Smith*, 237 U. S. 101. There the Court said: "By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. *Rev. Stat. §§ 913, 917; Niles v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430; *Dodge v. Tulleys*, 144 U. S. 451, 457; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204. As was said in the first of these cases, 'Wherever a case in equity may arise, and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable.'"

³⁵ Cf. the conflict of laws doctrine that statutes of limitation, in general, pertain to procedure. *Goodrich, Conflict of Laws* (1927) 168.

New York, and based on the concurrent equity "jurisdiction." The lower court had held that it was bound by the New York statute, that the suit was not one within the statutory provision relating to an action "to procure a judgment . . . on the ground of fraud," as that provision had been construed by the New York courts, and that consequently the cause of action accrued upon the commission of the alleged frauds and not at the date of their discovery, with the result that the action was barred by the statute after the lapse of six years. The Supreme Court rejected that argument based upon the statute. After citing cases, including *Robinson v. Campbell*, *supra*, the Court said (p. 138): "In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and [fol. 107] that sometimes they act upon the analogy of the like limitation of law. *But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.*"^{35a} We see nothing to indicate that the doctrine of the *Kirby* case has been over-ruled or modified by *Eric v. Tompkins*.

Russell v. Todd, 309 U. S. 28, decided since the *Tompkins* case, was a suit in equity, brought in a federal district court in New York to enforce the individual liability of shareholders of a Federal Joint Stock Land Bank. The defendant argued that the action was barred by the New York 3-year statute of limitations relating to suits to enforce liabilities of stockholders. The court held that the suit was one exclusively of "equitable cognizance, in that it is not predicated upon any legal cause of action," and that, as the New York courts had decided that the 3-year statute did

^{35a} Emphasis added.

not apply to such an equity suit, it did not govern in the federal courts. As the only New York limitations provisions applicable to such an equity action was the ten-year statute and as less than ten years had run, the Court said that it had no occasion to consider the question before us in the instant case. But, in the course of its opinion, the Court reviewed the previous decisions, saying that, though not regarding themselves as bound by state statutes of limitations, federal equity courts will nevertheless, when "*consonant with equitable principles*,"³⁶ adopt as their own a local statute of limitations applicable to similar equitable causes of action; that when the equitable jurisdiction of the federal court is concurrent with that at law, or when the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute; and [fol. 108] that where the equity jurisdiction is exclusive, state statutes barring action at law, are inapplicable. In its discussion, the Court made the following significant comment (309 U. S. 288, note 1): "But federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of *special equitable doctrines making it inequitable to apply the statute*. * * * *Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant.*" (Citing, inter alia, the Kirby case.)³⁷

That the doctrine of federal court independence concerning equitable "remedial rights" is distinct and apart from that of *Swift v. Tyson*, which *Eric v. Tompkins* overruled, clearly appears from the fact that Mr. Justice Brandeis, the arch enemy of *Swift v. Tyson*, enthusiastically endorsed the "remedial rights" doctrine in *Pusey & Jones v. Hanssen*, 261 U. S. 491,³⁸ which cited with approval *Guffey v.*

³⁶ Emphasis added.

³⁷ Emphasis added.

³⁸ In *Pusey & Jones v. Hanssen*, an unsecured creditor, who filed a bill in a federal court seeking the appointment of a receiver for a corporate debtor, relied on a state stat-

Smith, 237 U. S. 101, 114, one of the leading cases upholding that doctrine.³⁹ Mr. Justice Holmes who, in *Kuhn v. Fairmont*, 215 U. S. 349, 370, had sharply criticized *Swift v. Tyson*, five years later concurred in *Guffey v. Smith*, and [fol. 109] eight years after that decision concurred in *Pusey & Jones, supra*.⁴⁰ That Mr. Justice Brandeis in no wise objected to the extension of the "remedial rights" doctrine to state limitations statutes appears from his opinion, for the Court, in *Benedict v. New York*, 250 U. S. 321, 327-328, where he cited the *Kirby* case with approval.⁴¹ We find it

ute which expressly authorized such an action. The Court, in explaining why such relief must be refused despite the state statute, reviewed the previous decisions and gave a masterful exposition of the distinction between substantive and equitable remedial rights.

³⁹ See also *Shapiro v. Wilgus*, 287 U. S. 356, in which Brandeis, J., concurred.

⁴⁰ That these concurrences cannot be explained as a subsequent acquiescence in *Kuhn v. Fairmont* appears from the fact that, thirteen years after *Guffey v. Smith* he again, in his dissenting opinion in *Black & White Taricab Co. v. R. & Y. Taricab Co.*, 276 U. S. 518, 532, vigorously objected to the *Swift v. Tyson* doctrine. Brandeis, J., concurred in that dissent. Two years later, both those Justices concurred in *Henrietta Mills v. Rutherford*, 281 U. S. 121, 127-128, where the distinction between substantive and equitable "remedial" rights was reiterated and a state remedial statute was again ignored.

⁴¹ There, in a suit to enforce an express trust, he said: "Under the law of New York the alleged cause of action would have been subject, if not to the six-year statute of limitations (New York Code of Civil Procedure, § 382), then to the ten-year statute of limitations (New York Code of Civil Procedure, § 388), governing bills for relief in cases of the existence of a trust not cognizable by the courts of common law. *Clarke v. Boarmán's Executors*, 18 Wall. 493. If the Act of 1874 created an express trust, the statute of limitations would not begin to run until there had been a repudiation of the trust. *New Orleans v. Warner*, 175 U. S. 120, 130. Here there was an open repudiation of the trust duties which the plaintiff now seeks to enforce. And seventeen years were allowed to elapse after that re-

impossible to believe that, speaking for the Court, he in-
[for 110] tended to over-rule *Kirby* and *Pusey & Jones* in
Erie v. Tompkins which nowhere mentions those cases or
the doctrine which they embody.

Failure to observe the distinction between that doctrine
and the *Swift v. Tyson* doctrine leads defendant to make
the erroneous suggestion that in *Ruhlin v. New York Life*
Ins. Co., 304 U. S. 202 (decided a week after *Erie v. Tomp-*
kins) the court (by implication, held that the *Tompkins* case
had obliterated the precedential value of cases like *Kirby*
and that therefore the remarks of the Chief Justice in the
later case of *Russell v. Todd* were in error, or, at best,
"merely part of an historical conspectus" superfluously re-
calling abandoned precedents. In the *Ruhlin* case, the court
vacated a judgment and remanded because, in a suit in
equity, the lower federal court had, a la *Swift v. Tyson*,
construed an "incontestability clause" of a life insurance
policy according to "general" or "federal" law and not
with reference to the law of the state in which the federal
district court was located. Thus that case merely applied
the *Tompkins* rule to substantive rights when involved in
equity cases. The Court had no occasion to consider, and
the opinion did not, therefore, discuss, the question whether,
the substantive rights being settled according to state deci-
sions, the federal court should grant equitable relief of a

pudiation before this suit was begun and more than ten
years before any attempt was made to secure some settle-
ment by negotiation; and there clearly was no waiver of the
statute. While it is true that federal courts sitting in
equity are not bound by state statutes of limitations (*Kirby*
v. Lake Shore & M. S. R. Co., 120 U. S. 130), they are,
under ordinary circumstances, guided by them in determin-
ing their action on stale claims. *Goddard v. Kimmell*, 99
U. S. 201, 210; *Philippi v. Philippe*, 115 U. S. 151; *Pear-*
sall v. Smith, 149 U. S. 231; *Alsop v. Riker*, 155 U. S. 448.
Compare *Sullivan v. Portland & Kennebec R. Co.*, 94 U. S.
806, 811. Between 1892 and 1905 plaintiff did nothing to
enforce his alleged rights except to commence in 1893 a
suit which he did not prosecute. His lack of diligence is
wholly unexcused; and both the nature of the claim and the
situation of the parties was such as to call for diligence.
The lower courts did not err in sustaining the defense of
laches.

kind other than that granted in the state courts.⁴² Accordingly, it left untouched the settled doctrine as to equitable remedial rights; and, as no question of limitations was involved in *Ruhlin*, that case did not even intimate that the matter of limitations was no longer to be regarded as affecting such remedial rights. It is significant that, after [fol. 111] the *Ruhlin* case, the Court, in *Sprague v. Ticonic Bank*, 307 U. S. 161, 164, cited with approval *Robinson v. Campbell* and other similar subsequent cases, and that later, in *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377, 381, the Court cited and followed *Pusey & Jones v. Manssen*.⁴³ *Ettelson v. Metropolitan Life Insurance Co.*,

⁴² The same is true of *New York Life Ins. Co. v. Jackson*, 304 U. S. 261; *Rosenthal v. New York Life Ins. Co.*, 304 U. S. 263; *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111; *Wichita Royalty Co. v. City National Bank*, 306 U. S. 103, 107; *Cities Service Co. v. Dunlap*, 308 U. S. 208; *Fidelity Trust Co. v. Field*, 314 U. S. 169; *West v. American Tel. & Tel. Co.*, 311 U. S. 223, 236; *Stoner v. New York Life Ins. Co.*, 311 U. S. 464; *Griffin & McCoach*, 313 U. S. 498; *Pecheur Co. v. National Candy Co.*, 315 U. S. 666; and *Meredith v. Winter Haven*, 320 U. S. 228.

In *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, in a suit at law, the Court held that *Eric v. Tompkins* was not applicable because the plaintiff was a federal corporation suing under a federal statute which provided that all suits to which that corporation was a party "shall be deemed to arise under the laws of the United States." The majority of the Court did not consider alternative grounds for its decision noted by Mr. Justice Jackson, i. e., that *Eric v. Tompkins* did not apply because jurisdiction was not founded upon diversity of citizenship or perhaps because the defense of equitable estoppel might be considered "an equity matter" although the action was at law. That the majority of the Court did not rely upon the doctrine relating to remedial rights when "equitable estoppel" was involved is no indication that it obliterated that doctrine.

⁴³ In *Black & Yates v. Mahogany Ass'n*, 129 F. (2d) 227, 233 (C. C. A. 3, cert. den. 317 U. S. 672) the Court said: "The rule of *Eric v. Tompkins* being determinative of substantive rights, there is still preserved a uniform basis for granting equitable remedies in cases in which substantive rights have arisen under state law."

317 U. S. 188 teaches that the new Rules have not obliterated the distinction between actions at law and suits in equity.

It may be that equity jurisdiction in the instant case is exclusive and not concurrent. Which it is, must be determined not by New York but by federal decisions as to the federal equity jurisdiction existing at the time of the adoption of the Constitution or of the enactment of the Judiciary Act of 1789.⁴⁴ At that date, an action against a trustee for breach of trust seems to have been within the [fol. 112] exclusive cognizance of equity.⁴⁵ And it would seem that the "jurisdiction" of such a suit is not to be regarded as "concurrent" for the purposes here under discussion, even if the beneficiary can sue at law.⁴⁶ Doubtless a trustee may make a contract imposing upon him legal

⁴⁴ See, e.g., *Mississippi Mills v. Cohn*, 150 U. S. 202, 206; *Petroleum Co. v. Commissioner*, 304 U. S. 209, 217; *Russell v. Todd*, 309 U. S. 280, 286; *Stratton v. St. L. & S. W. Ry.*, 284 U. S. 530, 533, 540; *Matthew v. Rodgers*, 284 U. S. 521, 529; *Gordon v. Washington*, 295 U. S. 30, 37; *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 43; *Sprague v. Ticonic Bank*, 307 U. S. 161, 163-164; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 563; *Payne v. Hook*, 7 Wall. 425, 430; cf. *Rules of Equity Practice*, 7 Wheat. xvii, Rule xxxiii.

Of course, Congress can change the scope of the equity jurisdiction; *Sprague v. Ticonic Bank*, *supra*.

⁴⁵ See 3 Halsbury's *Laws of England* (2d ed.) 305.

See also *Alexander v. Hillman*, 296 U. S. 222, 239; *Clews v. Jameson*, 128 U. S. 461, 479; 1 Pomeroy, *Equity Jurisdiction*, 654-687.

⁴⁶ The mere fact that the claim against a trustee is for money does not render the jurisdiction concurrent. See, e.g., *Taylor v. Benham*, 5 How. 232; *Bay State Gas Co. v. Rogers*, 147 F. 557, 560-561.

The Restatement of Trusts, § 197, says that "except as stated in § 198, the remedies . . . are exclusively equitable"; the remedies described in § 198 do not include a suit to "compel the trustee to redress a breach of trust" which is included, as an "equitable" remedy in § 199(c); and § 201 defines a breach of trust as a violation of "any duty" which the trustee "owes to the beneficiary."

obligations on which he may be sued on the "law side". But his obligations, qua trustee, are presumably still purely equitable in the federal courts, no matter how much he may modify them by contract.

It is, however, of no moment whether here the "jurisdiction" is or is not exclusively equitable.⁴⁷ For the *Kirby* case (cited with approval in *Benedict v. New York*, supra, and *Russell v. Todd*, supra) was a case of concurrent jurisdiction; yet the Court held that, if the defendant's misconduct prevented the plaintiff from learning his rights, the New York statute of limitations should be disregarded. Accord- [fol. 113] ingly, whether the equity jurisdiction is exclusive or concurrent; the court, where the defendant is guilty of "inequitable conduct" causing plaintiff's ignorance of his rights will toll the statute. In all the cases cited in *Russell v. Todd*, in which, where the equity jurisdiction was concurrent, the Court applied the local limitations statute,⁴⁸ either (a) there was no showing whatever of any

In *Miles v. Vivian*, 79 F. 848 (C. C. A. 2), the trustee was found guilty of negligence. The Court held that jurisdiction in equity as to such a breach of duty was concurrent and that therefore the statute of limitations would apply, especially as the plaintiff had long slept on his rights and showed no excuse for having done so. In *Frismuth v. Farmers Loan & Trust Co.*, 107 F. 169 (C. C. A. 2) again the action was for negligence on the part of the trustee. Here the basis of the action is not negligence but knowing failure to act where the trustee had a conflicting interest and plaintiff has not slept on her rights.

⁴⁷ That if the suit is of exclusively equitable cognizance the federal court will, when equitable considerations exist, disregard a state statute specifically applicable thereto, see cases cited in *Russell v. Todd* (309 U. S. at 288 note 1) such as *Alsop v. Riker*, 155 U. S. 448; *Patterson v. Hewitt*, 195 U. S. 309, 318; *Kelley v. Boettcher*, 85 F. 55, 62 (C. C. A. 8).

⁴⁸ *Wilson v. Koontz*, 7 Cranch 202; *Stearns v. Page*, 7 How. 818, 830-831; *Clarke v. Boorman*, 18 Wall. 505, 507; *Carol v. Green*, 92 U. S. 509; *Godfrey v. Terry*, 97 U. S. 175; *Baker v. Cummings*, 169 U. S. 189, 206-207; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 448-449; *Wood v.*

inequitable conduct of the defendant accounting for plaintiff's ignorance of his rights or (b) the plaintiff, after becoming aware of his rights, slept on them.⁴⁸⁸

[fol. 114] Nor is it true, as defendant contends, that the federal courts have applied the *Kirby* doctrine only in or-

Carpenter, 101 U. S. 135; *Hughes v. Reed*, 46 F. (2d) 435 (C. C. A. 10); *Wagner v. Baird*, 7 How. 234; *Goddard v. Kimmel*, 99 U. S. 201. See also *Speidel v. Henrici*, 169 U. S. 206-207; *Curtis, Receiver v. Conolly*, 257 U. S. 261.

⁴⁸⁸ In *Roos v. Texas*, 126 F. (2d) 767 (C. C. A. 5) there was no showing of plaintiff's "ignorance of his rights because of the fraud or inequitable conduct of the defendant" and the opinion discloses that plaintiff was clearly chargeable with laches.

In *Shultz v. Manufacturers & Traders Trust Co.*, 128 F. (2d) 889, we held the New York limitations statute to be applicable to a suit for damages, accounting and other relief for an alleged conspiracy and fraud in defendant's acquisition of stock from plaintiff's decedent. But there the trial court had made explicit findings, which a majority of this court held amply supported by the evidence, that the decedent had known, or reasonably should have known, all the facts at or about the time of the alleged wrongdoing. True, our opinion stated that "no ground was shown . . . for purely equitable relief," and, in that connection, relied not on federal but on New York decisions, and the opinion also said that in *Russell v. Todd* the court "was ready to accept an explicit applicable state statute applicable to a suit of an exclusively equitable cognizance." As the plaintiff, on the findings, was there chargeable with the grossest delay, those portions of our opinion were in no way necessary to the decision, and we do not feel bound by them here where the facts are very substantially different. See *Cohens v. Virginia*, 6 Wheat. 264, 399; *Taylor v. Foss*, 271 U. S. 176, 184; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 394.

The doctrine of those cases last cited applies to *Union Mutual Life Ins. Co. v. Friedman*, 139 F. (2d) 542 (C. C. A. 2). There we held that, in a suit for recovery of moneys paid out because of defendant's fraudulent misrepresentations, defendant could not be deprived of a jury trial by

der to shorten the time within which the claim is barred because a plaintiff delays his suit without excuse. The opinion in the *Kirby* case itself shows that the rule has not been so limited as to favor only defendants, but works both ways.⁴⁹ See also Vandevanter, J., in *Stevens v. Grand Central Mining Co.*, 113 F. 28, 32 (C. C. A. 8);⁵⁰ Sanborn, J., in *Wilson v. Plutus Mining Co.*, 174 F. 317, 320-321 (C. C. A. 8).

It follows that, while we are bound by the interpretation which New York decisions give to the trust indenture, we are not required to apply the New York statute of limitations if there are strong countervailing equitable considerations. On the facts now before us, we cannot say that

treating the suit as one in equity. We said that it was not sufficient that the New York statute of limitations might bar recovery at law and might not in equity. As the record in that case shows, the facts were such that the effect of the statute was the same at law or in equity, i.e., the statute in any event did not run until the discovery of the fraud.

⁴⁹ In the frequently cited case of *Kelley v. Boettcher*, 85 Fed. 55, 62, (C. C. A. 8), Judge Sanborn said: "In the application of the doctrine of laches, the settled rule is that Courts of equity are not bound by but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. . . . The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

Cf. *Cooper v. Hill*, 94 F. 582, 589-591 (C. C. A. 8); *Chiswell v. Johnston*, 299 F. 681, 688 (App. D. C.); *Johnston v. Roe*, 1 F. 622; *Tice v. School District*, 17 F. 283 (C. C. D. Neb.); *Johnson v. White*, 39 F. (2d) 793, 798 (C. C. A. 8).

⁵⁰ Cited with approval in *Russell v. Todd*, *supra*.

defendant's conduct, which apparently led to plaintiff's ignorance of her rights, was not clearly "inequitable." [fol. 115] We conclude, then, that we cannot sustain the summary judgment on the ground that the action was barred by limitations or laches.⁵¹

12. Plaintiff prayed for relief on behalf of herself and all similarly situated noteholders. Defendant, on this appeal, urges that no such relief can be granted. Although that issue will not directly arise unless and until the trial court decides that defendant wrongfully caused a loss to non-accepting noteholders, we think it will; in the light of the protracted history of this litigation and the fact that the question has been argued before us, to indicate our views.

Rule 23(a) reads as follows: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." The complaint adequately states the common interest of all the non-accepting noteholders and that they are so widely scattered as to make it too ex- [fol. 116] pensive to join them all as parties.⁵² On the facts

⁵¹ Plaintiff alleges that, when she first learned of the cause of action she tried to intervene in *Hackner v. Guaranty Trust Co.* That attempted intervention, although based on an erroneous theory, was enough to rebut laches. *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 490-491; cf. *N. Y. Cent. R. Co. v. Kinney*, 260 U. S. 340, 346; *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 68-69; *Matty v. Grasselli Co.*, 303 U. S. 197, 200-201.

⁵² After the case is remanded, the defendant, of course, may, if it sees fit, traverse these allegations and try to show that plaintiff does not adequately represent the absent noteholders. However, this should be noted: The plaintiff does

alleged, all non-accepting noteholders suffered losses through a common breach of trust consisting of improper non-action by their common trustee. To be sure, the trustee may perhaps be able to show, as a defense, that, even if some of these noteholders had not sufficient knowledge of the facts, others who may intervene were aware of those facts, so that their loss did not flow from the trustee's inadequate disclosure. But such facts, if proved, will be by way of defense.⁵³ The claims here are not individualized fraud claims based upon individual misrepresentations. This action may, therefore, be maintained as a class suit under Rule 23(a) (3).⁵⁴

But it is obvious that such a ruling may be purely academic and lack all practical significance unless any other noteholder who intervenes will, for purposes of the defense [of 117] of laches, have the benefit of the date when plaintiff attempted to intervene in *Hackner v. Guaranty Trust*

not need to include the claims of others in order to maintain federal jurisdiction. As the suit comes within Rule 23(a) (3), so that a judgment will not be res judicata as to noteholders who do not intervene, there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class.

⁵³ The defendant may have other defenses against specific intervenors.

⁵⁴ In *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95 (C. C. A. 2), Hackner and the other noteholder plaintiffs (except York who was dismissed as plaintiff) had accepted the offer, alleging that they had been induced by misrepresentations to part with their notes and had thereby suffered losses. As each such accepting noteholder, in order to recover, needed to show that he, individually, had acted in reliance on alleged misrepresentations, we held that, for purposes of establishing the requisite jurisdictional amount, the claims of the several plaintiffs could not be aggregated. Cf. *Central Mexico Light & Power Co. v. Munch*, 116 F. (2d) 85, 89 (C. C. A. 2). For the Rules could not affect basic jurisdictional requirements fixed by statute. But there were no similar inhibitions as to changes affecting loss of rights through lapse of time, as indicated by Rule 60(b).

Co.^{54a} Before the new Rules, that question seems not to have been considered as to suits of the kind now described in 23(a) (3), but it was several times answered in favor of intervenors in class suits of the character now described in 23(a) (1) and (2). *Richmond v. Frons*, 121 U. S. 27, 54; *Marsh v. United States*, 97 F. (2d) 327, 330 (C. C. A. 4); *Newgate v. Atlantic & D. R. Co.*, 72 Fed. 712, 716; *Dobson v. Simonfon*, 93 N. C. 268, 271-273.⁵⁵ In the case last cited, the court said: "It would be a strange anomaly in the law, if it should allow an action to be brought for a party, and he should thus be encouraged to rely upon it, and not seek legal redress otherwise than by it, and yet when he came, in the course of his action, to prove his debt, and share in the fund, to treat him as having, by such reliance, lost it by the lapse of time happening after the bringing of the action. The law will not mislead—it is just and faithful, and will not tolerate, much less uphold, a rule of practice that works such injustice and absurdity." We think those comments are apposite here. We agree with *Deckert v. Independence Shakes Corp.*, 39 Fed. Supp. 592, 597⁵⁶—seemingly the only case discussing the problem, and one which is cited and quoted with apparent approval in 2 Moore, Federal Practice, 1942 Supplement, p. 99⁵⁷—that Rule [fol. 118] 23(a) makes no differentiation, for purposes of limitations (and therefore of laches), between class suits under (1), (2) and (3). As to suits under (3), no less than those under (1) or (2), the Rule unequivocally tells all per-

^{54a} See footnote 51a. The complaint in that suit, brought by accepting noteholders, prayed relief on behalf of all others similarly situated. Her intervention should be deemed to have adopted that prayer *vis a vis* non-accepting noteholders.

⁵⁵ Cf. *Southern Pacific Co. v. Bagert*, 250 U. S. at 489-490.

⁵⁶ There the court, considering the suit, in the alternative, either as under 23(a) (2) or (3), held that there was no difference in this respect.

⁵⁷ The same discussion (relating to intervention under Rule 24) appears in Moore's 1943 Supplement, page 105. Earlier, in 1938, before the *Deckert* case, Moore, in his comments on dismissal of class actions under Rule 23(e), had expressed a different view (Volume 2, page 2280, note 11); however, in his annotation in his 1943 Supplement, page

sons having claims of the type therein described that one or more of them may begin such a class-action "on behalf of all" when the "class" is "so numerous as to make it impracticable to bring them all before the court." Any non-accepting noteholders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap. Since, in a class suit under clause (3), a judgment will not be res judicata for or against those of the class who do not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such noteholders to intervene (if they have not theretofore done so), judgment to be entered in favor only of those who do so within a reasonable time. Those who do intervene will be no more barred by lapse of time than is the plaintiff, unless defendant can prove special facts affecting them.

Reversed and remanded.

[fol. 119] AUGUSTUS N. HAND, *Circuit Judge* (dissenting):

Upon reconsideration of this case on the petition for rehearing, I have become convinced that we seriously erred in our original decision. I can see no reason to suppose that the Guaranty Trust Company was guilty of a breach of any fiduciary relation which it assumed under the trust indenture.

In Article Four, Section 22, dealing with "Remedies on Default", the trust indenture provided that in the event of any of the defaults enumerated " . . . the Trustees may, and upon the written request of the holders of at least twenty-five per cent in principal amount of the notes, then

84, to that earlier comment, he makes a cross-reference to his more recent discussion of the *Beckert* case.

As Moore states, that decision was reversed "on other grounds" in *Pennsylvania Co. For Insurance etc. v. Deckert*, 123 F. (2d) 979 (C. C. A. 3). There, as to limitations, the court, as we read its opinion, held merely that, in a clause (3) suit, the claim of an intervenor is barred if, before the institution of that suit, the statute had run against his claim.

outstanding, shall, declare the principal of all the notes then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in the notes contained to the contrary notwithstanding."

In Article Seven, Section 33, the indenture provided that:

"The Trustee shall not be answerable for . . . anything whatever in connection with this trust except for its own wilful misconduct"; also that: "Anyone holding the office of Trustee hereunder may from time to time purchase, acquire, hold, own and deal in any of the notes and may assert its rights in respect thereof in the same manner as any other noteholder hereunder. The Trustee or any company in which it or its stockholders may be interested or affiliated, or any officer or director of the Trustee or of any such company, may acquire and hold any of the notes and coupons, or may engage in or be interested in any financial or other transaction with the Company or any corporation in which the Company may be interested . . ."

Under the foregoing provisions there was no duty on the part of the trustee to declare or to procure a default, even though it might hold an adverse interest, as a creditor [fol. 120] of the debtor, to some of the noteholders. The indenture gave the trustee the right to become a creditor.

To procure a general liquidation by declaring a default would have been in the interest of no one connected with the enterprise, for all of the noteholders would have been likely to obtain less for their claims than by proceeding with the 50% plan offered by the debtor at the instigation of the trustee. It is doubtless true that the trustee could not refrain from exercising any right it had to declare a default in order to secure an advantage to itself at the expense of the noteholders. But I think there is no reason to suppose that it did refrain for any such reason. If it had not promoted the making of the 50% offer to the noteholders and had allowed matters to drift and the debtor to continue to purchase the notes at 50 cents on the dollar or less, as it was doing, the lending banks, of which the trustee was one, would have received some \$7,500,000 of cash from Vaness instead of the relatively trifling sum which came to them out of the balance of moneys arising from the failure of the non-assenting note-holders to accept the offer. That it arranged to have the 50% offer made and, thus sought to protect the interests of the noteholders showed

its honest purpose. It seems impossible to suppose that a plan which yielded the banks only \$106,000, and that because the non-assenting noteholders declined to accept it, was entered into in order that the banks should make money at the expense of any of the noteholders. I can see no duty to declare a default merely because the trustee, as a lender, had an interest in not having a default declared. The trust instrument gave the trustee the right to become such a lender and yet explicitly made the exercise of the power to declare a default permissive and discretionary. The Guaranty Trust Company was acting for the noteholders as a whole and if liquidation rather than acceptance of the plan would injure all of them, I can see no obligation to liquidate to the injury of the majority merely because some [fol. 121] noteholders failed to accept when acceptance was to their advantage as well as to that of all the other noteholders and the lending banks. I do not think that a disclosure of the loans which the trustee was permitted to make under the trust indenture was either necessary or relevant to the only problem the non-accepting noteholders had which was whether or not to accept an offer that the debtor correctly advised them was to their advantage. To justify the plaintiff's claim on the merits we must regard the promotion of the 50% offer, the trustee's procurement of an extension of time to accept it beyond the original acceptance date, and the acceptance of the offer by 96% of the noteholders, as insufficient to show good faith on the part of the trustee. I think these factors negative any inference that the failure of the trustee to give explicit information as to the probability of serious loss to non-acceptors was in the hope that noteholders would refuse to accept and thus bring some advantage to the lending banks.

But aside from any question as to the merits of plaintiff's claim, I see no sufficient reason for not holding it barred by the New York statute of limitations, under which claims like the one sued on here would be barred if not asserted within ten years after they had accrued. Since the rule announced in *Eric R. Co. v. Tompkins*, 304 U. S. 64, and *Ryhlín v. New York Life Insurance Co.*, 304 U. S. 202, became law, I think the situation is most rare when we should disregard the local statute of limitations because the proceeding is equitable. This seems implicit in the decision in *Russell v. Todd*, 309 U. S. 280, and while, because of the footnote to the opinion found at page 288, it seems probable

that equitable claims may be asserted in extreme situations even if the local statute of limitations has expired, I cannot believe that the present is such an occasion. Any fault here lay in the omission of the trustee to warn the plaintiff of the loss she would incur if she failed to accept the [fol. 122] debtor's offer. That I regard as at most an act of negligence which was something far different from a deliberate concealment in order to prevent the non-accepting noteholders from bringing suit. The plaintiff here must have known she had suffered a loss which she would not have suffered if she had accepted the offer. She also was bound to know that the trustee had a right to have an interest either as a noteholder or lender in the assets of the debtor and its subsidiaries. Yet she took no steps to discover and assert any rights she had for more than ten years. In such circumstances I can see no reason for extending any indulgence to the plaintiff beyond the period of the New York statute of limitations. In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws. The main foundation for the criticism of *Swift v. Tyson* was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts. The exercise of a wide discretion as to whether to apply the state statutes of limitation would tend to promote the assertion of moral superiority on the part of the federal courts since they would be setting up rules of limitation which they would regard as more equitable than those of the state courts in situations where neither Congress nor the Federal Rules of Civil Procedure have prescribed limitations of their own. Moreover, any such practice will give rise to a new and difficult class of cases in which the United States courts in dealing with equitable claims will have to determine whether the rule to be applied is one of substantive law or of remedial rights.

In view of the foregoing I think we should hold that the plaintiff's claim is not established on the merits and that in any event it is barred by the New York ten year statute of limitations. Accordingly the judgment of the court below should, in my opinion, be affirmed.

[fol. 123] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

GRACE W. YORK, Plaintiff-Appellant,

v.

GUARANTY TRUST COMPANY OF NEW YORK, Defendant-
Appellee

Appeal from the District Court of the United States for the
Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 124] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, Grace W. York v. Guaranty Trust Company of New York. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 29, 1944. Alexander M. Bell, Clerk.

[fol. 125] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 126] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the first question presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts and Mr. Justice Douglas took no part in the consideration or decision of this application.

(5036)

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 264

GRACE W. YORK,

Respondent,

against

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT
AND BRIEF IN SUPPORT THEREOF**

GUARANTY TRUST COMPANY OF NEW YORK

By JOHN W. DAVIS

RALPH M. CARSON

Attorneys for Petitioner

15 Broad Street

New York, N. Y.

July 12, 1944.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

GRACE W. YORK,

Respondent.

against

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner.

No.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

*To the Honorable the Chief Justice and
Associate Justices of the United States:*

Guaranty Trust Company of New York, a New York corporation, defendant in the above-entitled action, respectfully prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order and decision of the Circuit Court of Appeals for the Second Circuit rendered herein May 25 1944, one judge dissenting, (R. pp. 64-66, 123) which reversed a judgment entered by the United States District Court for the Southern District of New York on October 22 1943 dismissing the complaint (R. 27) upon the ground of the previous decision of the Second Circuit Court of Appeals (*Hackner v. Morgan* 130 F. 2d 300) with respect to which this Court denied certiorari (317 U. S. 691). The record upon which was rendered the decision herein

sought to be reviewed is acknowledged (R. 82) to have been substantially the same as the record upon which the same Circuit Court of Appeals had previously reached the opposite result.

Summary Statement of Matter Involved

The suit was brought on January 22 1942 by a citizen of Pennsylvania against a citizen of New York as a spurious class action (Rule 23 [a][3] of the Federal Rules of Civil Procedure) to enforce a claim for breach of trust claimed to have arisen in 1931 against the petitioner as indenture trustee of an issue of notes. It involves the rule in *Eric R. Co. v. Tompkins* 304 U. S. 64; the application thereof made by *Russell v. Todd* 309 U. S. 280; and the application of Rule 56 of the Federal Rules providing for summary judgment—as to all of which petitioner contends that the Second Circuit Court of Appeals has erred.

Plaintiff as owner of \$6,000 of notes issued in May 1930 by Van Sweringen Corporation, sues on behalf of a class of noteholders aggregating \$1,213,000 of the \$30,000,000 issue, on the theory that petitioner as trustee of the note issue had committed a breach of trust in consenting to and assisting an exchange offer made to noteholders by Van Sweringen Corporation on October 29 1931 which was accepted by all the noteholders except plaintiff and her class, i.e. by some 96% of the noteholders. Respondent did not own her notes at the time of the exchange offer, having concededly acquired them as a gift in April 1934 (R. 16).

Defendant moved for summary judgment before answer pursuant to Rule 56 (b) upon the basis primarily of the decision of the District Court and Circuit Court of

Appeals in *Hackner v. Morigan (Eastman v. Guaranty Trust Company)* in 43 F. Supp. 337 and 130 F. (2d) 300, with respect to which this Court denied certiorari in 317 U. S. 691 and denied a rehearing of the petition for certiorari in 317 U. S. 713.

The theory of both the *Hackner* and the *York* suits was that petitioner had violated its duties as trustee in permitting the making of the exchange offer; that petitioner had to its own potential advantage permitted utilization for the purpose of the exchange offer, of certain securities which the obligor Van Sweringen Corporation had undertaken to keep segregated and free and clear for the benefit of all noteholders. The exchange offer gave noteholders, for each \$1,000 note, \$500 in cash and 20 shares of stock of Van Sweringen Corporation. *Hackner (Eastman)* brought a representative action on behalf of noteholders who had accepted the offer, and on *Guaranty Trust Company's* motion for summary judgment this action was dismissed on the merits by the District Court and the Circuit Court of Appeals in decisions which this Court declined to review. Thereafter *York* brought a similar action on behalf of noteholders who had declined the offer, under the same indenture and upon substantially the same record in every respect. The District Court, following the previous course of decision, again granted summary judgment (R. 27, 23). But this time, upon appeal, the Second Circuit Court of Appeals by Frank J. (who had concurred in part in the *Hackner* case) reached an opposite result, holding that the indenture imposed upon petitioner the duties of an express trustee whereas the former Court had held the contrary; holding that petitioner had violated those duties whereas the former Court had left undisturbed the District Court's

determination to the contrary; holding that petitioner's breach of duty had caused damage to the plaintiff whereas the former Court had held the contrary; and finally, declining to apply the New York six-year and ten-year statute of limitations on the theory that even in a diversity case a Federal court of equity may at its pleasure vary the rule of limitations of the forum in accordance with what the court considers to be "equitable."

Respondent's contention in this case and plaintiff Hacker's contentions in the prior case were that petitioner had violated a fiduciary relationship in that the position of petitioner as a bank creditor of an affiliate of Van Sweringen Corporation was or might have been benefited by consummation of the exchange offer. However, respondent did not seek to defeat summary judgment by claiming the existence of an issue of fact. Respondent on the contrary stipulated that the facts set forth in petitioner's moving papers were true (R. 16-17) and further conceded the absence of any issue by making her own cross-motion upon the same papers (R. 22).

Rehearing in Circuit Court of Appeals

The opinion of the Court of Appeals reversing the judgment of dismissal below (R. 27) was rendered by that Court March 2 1944. The decision remanded the action for trial. Petitioner then filed in the Court of Appeals a petition for rehearing (R. 35-60), which led to reconsideration of the opinion (R. 61-3). In consequence, while as a formal matter the Court denied rehearing, it did recall its opinion of March 2 1944 and substitute a revised opinion dated May 25 1944 (R. 64-5, 66-122).

The substituted opinion of May 25 1944 reached the same result as did the opinion of March 2 1944, but represented a modification thereof in some respects. Moreover, while the Court in the prior opinion had been unanimous, one judge (A. N. Hand J.) dissented from the final opinion (R. 119-122). The dissenting judge candidly stated (R. 119-121):

"Upon reconsideration of this case on the petition for rehearing, I have become convinced that we seriously erred in our original decision. I can see no reason to suppose that the Guaranty Trust Company was guilty of a breach of any fiduciary relation which it assumed under the trust indenture. . . . But aside from any question as to the merits of plaintiff's claim, I see no sufficient reason for not holding it barred by the New York statute of limitations. . . ."

After the filing of the substituted opinion of May 25 1944, the majority inserted various minor amendments which will appear on the certified copy filed with this Court.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 USCA §347.

The decision and order of the Circuit Court of Appeals herein were filed on May 25 1944 (R. 64, 66). The order for mandate was entered June 29 1944 (R. 123). On June 13 1944 the Circuit Court of Appeals stayed the mandate for thirty days, pending petitioner's application for a writ of certiorari.

Questions Presented

1. In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?

2. Can a Federal court of equity, in a diversity case, consistently with the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, extend the period of limitations by equitable considerations of laches when the doctrine of laches is not recognized for such purposes by the State courts in similar cases?

3. Assuming that a Federal court exercising exclusively equitable jurisdiction in a diversity case may employ the doctrine of laches to extend the period of limitations established by the law of the State in equity cases, is not the present action, being a claim for money damages against an indenture trustee, one of concurrent jurisdiction in which equity must apply without exception the statute of limitations as at law?

4. Did the Court of Appeals correctly apply the substantive law of the forum, as required by *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202 and subsequent cases, in treating petitioner as the trustee of an express trust notwithstanding the absence of a *res*?

5. Did the Court of Appeals correctly apply the substantive law of the forum, as required by the *Erie* and *Ruhlin* cases, in refusing to hold that the exculpatory clause of the indenture constituted a defense on the stipulated facts?

6. Did the Court of Appeals correctly apply the substantive law of the forum, as required by the *Erie* and *Ruhlin* cases, in permitting plaintiff to maintain this action in respect of notes which she did not own at the time of the transactions complained of; and in further holding that the burden of proof was upon petitioner with respect to the possible existence of an express assignment of the cause of action?

7. Did the Court of Appeals correctly apply Rule 56 of the Federal Rules of Civil Procedure (dealing with summary judgment) adopted by this Court, 308 U. S. 647, pursuant to the Act of June 19 1934, 48 Stat. 1064, in declining to give effect to the record before it with respect to questions 5 and 6 above stated and in remanding the case?

8. Under the correct rule of damages, did plaintiff's claim in respect of her \$6,000 of notes exceed \$3,000 exclusive of interest and costs?

Reasons for Allowing the Writ

1. In holding that the New York six-year and ten-year statutes of limitation need not be applied by it (R. 102-115), the Court of Appeals

(a) departed from the law of the forum as fixed by New York Civil Practice Act §48 and §53 and decisions in *Potter v. Walker* 276 N. Y. 15, *Keys v. Leopold* 241 N. Y. 189, *Kalmanash v. Smith* 291 N. Y. 142, *Cwerdinski v. Bent* 281 N. Y. 782, *Dunlop's Sons, Inc. v. Spurr* 285 N. Y. 333; *Singer v. Carlisle* 26 N. Y. S. (2d) 172, 261 A. D. 897, leave to appeal denied 285 N. Y. 863, and *Goldstein v. Tri-Continental Corporation* 282 N. Y. 21;

(b) deviated from its own decision in *Shultz v. Manufacturers & Traders Trust Co.* 128 F. (2d) 889, as to which this Court denied certiorari in 317 U. S. 674;

(c) disregarded the doctrine plainly established by this Court in *Russell v. Todd* 309 U. S. 280, 293 that Federal courts of equity even in a non-diversity case will adopt and apply local statutes of limitation which are applied to like causes of action by the State courts, and also disregarded the principle of the *Erie* and *Ruhlin* cases upon which *Russell v. Todd* rests;

(d) conflicted with the decision of the Fifth Circuit Court of Appeals in *Roos v. Texas Co.* 126 F. (2d) 767 and with the opinion of the Third Circuit Court of Appeals in *Black & Yates v. Mahogany Association* 129 F. (2d) 227 as to which this Court denied certiorari in 317 U. S. 672.

2. The decision below is also in conflict with *Erie R. Co. v. Tompkins* and *Ruhlin v. New York Life Insurance Company* in employing as a reason for the extension of the New York statutory term of limitations equitable considerations of laches which are no part of the substantive law of New York (New York Civil Practice Act §10; *Gilmore v. Ham* 142 N. Y. 1, 6; *Pollitz v. Wabash R. Co.* 207 N. Y. 113, 130).

3. In declining to regard the jurisdiction of equity in this case as concurrent with that at law and in holding that it is of no moment whether the jurisdiction here is or is not exclusively equitable, the Court below departed from the established course of decision in both the State and

the Federal courts as instanced by *Keys v. Leopold* 241 N. Y. 189 and by *Clarke v. Boornian's Executors* 18 Wall. 493, 505 and other authorities cited in *Russell v. Todd* 309 U. S. 280, 289; and also departed from the rule of the *Erie* and *Ruhlin* cases.

4. The decision below is believed to be at variance with the substantive law of New York on three questions presented by this record; namely,

- (a) the requisites of an express trust in New York as shown by *Broken v. Spohr* 180 N. Y. 201, and by *Bradford v. Chase National Bank* 24 F. Supp. 28, 105 F. (2d) 1001, 309 U. S. 632, and *Hackner v. Morgan* (*Eastman v. Guaranty Trust Company*) 43 F. Supp. 637, 130 F. (2d) 300, cert. denied 317 U. S. 691;
- (b) the inability of subsequent holders of bonds or notes to sue in respect of prior transactions, as instanced by *Elkind v. Chase National Bank* 259 A. D. 661, 284 N. Y. 726, and *Smith v. Continental Bank & Trust Company* 292 N. Y. 275. The Court of Appeals recognized the effect of the decisions in New York on this subject (R. 102) but refused to apply them on the basis of assumptions contrary to the New York law;
- (c) the effect under New York law of the exculpatory clause in the indenture under which plaintiff claimed, as instanced by *Hazzard v. Chase National Bank* 159 Misc. 57, 257 A. D. 950, 282 N. Y. 652.

5. With respect to the possible existence of an assignment of the cause of action within the New York rule, the Court of Appeals refused to follow the law of the forum concerning the burden of proof as established by *Smith v. Continental Bank & Trust Company* 292 N. Y. 275, although required to do so by the decision of this Court in *Cities Service Oil Co. v. Dunlap* 308 U. S. 208.

6. The decision below seriously impairs the usefulness of summary judgment under Rule 56 of the Federal Rules of Civil Procedure in refusing to accept for the purpose of sustaining a judgment of dismissal below a record accepted as complete by the parties through both stipulation (R. 16-17) and cross-motion (R. 22) and in remanding the case for trial, notwithstanding the record made by the parties.

7. Stability and due order in the administration of justice suggest the desirability of a review by this Court, in view of the fact that on substantially the same record the same Court of Appeals in *Hackner v. Morgan (Eastman v. Guaranty Trust Company)* 130 F. (2d) 300 reached the opposite result which this Court refused to review, 317 U. S. 691 and 713. Taking both cases together, we call attention to the fact that four judges in the lower courts have found petitioner to be right on the merits, and only one judge has thought a remand and trial to be necessary; i.e., Bright D.J. and Chase and Clark JJ. in the *Hackner* case, and A. N. Hand J. in the *York* case have found for the petitioner, whereas Learned Hand J., in the *York* case, alone has found for the respondent if we eliminate Frank J. on the ground that he has voted both ways

(with respect to one issue involved), and Rifkind D.J. in the *York* case on the ground that his decision for the petitioner was controlled by the previous decision of the Court of Appeals in the *Hackner* case. It would be in the interest of the administration of justice that this conflict and diversity in the same Court of Appeals on the same record should be resolved in this Court.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order and decision of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

GUARANTY TRUST COMPANY OF NEW YORK

By JOHN W. DAVIS/
RALPH M. CARSON
Attorneys for Petitioner
15 Broad Street
New York, N. Y.

July 12, 1944.

BRIEF IN SUPPORT OF PETITION**Opinions Below**

The opinion of Rifkind, D.J. granting summary judgment to petitioner (R. 23-5) is not reported. The opinion of the Second Circuit Court of Appeals as revised after reconsideration on May 25 1944 (R. 66-122) has not yet been reported. The opinion of the District Court granting summary judgment on substantially the same record in *Hackner v. Morgan (Eastman v. Guaranty Trust Company)* appears in 43 F. Supp. 637, and unanimous affirmance thereof by the Second Circuit Court of Appeals is reported in 130 F. (2d) 300. Certiorari was denied by this Court, 317 U. S. 691 and 713.

Jurisdiction of this Court

The order and decision of the Circuit Court of Appeals for the Second Circuit were filed May 25 1944 (R. 64, 66) and the order for mandate entered June 29 1944 (R. 123). Jurisdiction of this Court is invoked under Judicial Code §240 (a), 28 USCA §347 (a) as amended by the Act of February 13 1925.

Statement of the Case

Plaintiff commenced the action January 22 1942 in the United States District Court for the Southern District of New York (R. 1) as holder of \$6,000 principal amount out of \$1,213,000 still outstanding of a \$30,000,000 note issue which matured May 1 1935 (R. 2, 3). Petitioner was named trustee under a trust indenture executed by the

obligor, Van Sweringen Corporation, on May 1 1930 (R. 3). The indenture (reprinted at pp. 75-105 of the Hackner record filed in this Court, which record the parties stipulated should be deemed part of the record in the *York* case, R. 16), imposed certain duties and conferred certain powers on petitioner as trustee, but expressly limited its obligations and provided that it should not be liable for anything in connection with the trust except for its own "wilful misconduct" (Hackner record, p. 98). The petitioner as trustee was not given custody or possession of any *res*. For the better assurance of the noteholders, the obligor covenanted to keep certain assets segregated and free from encumbrance, and the two brothers Van Sweringen, by a separate instrument, undertook to maintain such assets at a market value equal to one-half the principal amount of the notes so long as \$15,000,000 thereof should be outstanding (Hackner record, pp. 105-111); but it was specifically provided that the segregated assets should not constitute collateral security for payment of the notes (Hackner record, p. 84).

In October 1930 petitioner with other banks constituting a group, made large advances to two corporations affiliated with the obligor Van Sweringen Corporation, and controlled by the two Van Sweringens personally. The collateral for these advances included the common stock of Van Sweringen Corporation. Petitioner's participation in these loans was motivated largely by its desire to protect the noteholders against a threatened default at that time (Hackner record, p. 21).

The grievance of plaintiff *York* is that in October 1931 petitioner consented to and assisted in a plan for public purchase of the notes for 50 cents on the dollar in cash and

delivery of 20 shares of the obligor's common stock against each note. The reasons why petitioner approved this procedure are fully set forth in three uncontradicted affidavits filed in the *Hackner* case (Hackner record, pp. 15-49) and made a part of the York record (R. 16), but the details are not material to the present application for certiorari. In substance, the proof showed, without exception or dispute, that the segregated assets were being threatened with dissipation by private purchases on a depressed market and that the petitioner as trustee was anxiously insistent that the assets of the obligor available for retirement of the notes be made publicly and equally available on the same terms to all noteholders. As the stock to be used in the purchase offer was part of the collateral securing the bank loan, consent of the banks including the petitioner had to be obtained to permit its withdrawal from the collateral. The purchase offer was made on October 29 1931 and remained open until December 15 1931 (Hackner record, pp. 70, 45).

Petitioner made no profit of any kind out of or in connection with the exchange offer, the primary contention of the plaintiff apparently being that in any event petitioner as a creditor in the bank loan stood to benefit by a substitution of collateral if a large proportion of noteholders did not accept the offer. The District Court in the *Hackner* case 43 F. Supp. 637, 642, found that Guaranty Trust Company received no part of the segregated assets for its personal benefit. This finding was affirmed by the Second Circuit Court of Appeals, 130 F. (2d) 300. In the instant case the Court of Appeals found on the same evidence that the creditor banks as a group received \$106,000 under the plan (R. 85), but the Court also

acknowledged that as a part of the plan the banks gave up a right to \$300,000 (R. 86). Although the fact is immaterial for the purposes of certiorari, we note that upon the uncontradicted evidence (Hackner record, pp. 32-3) the purported finding of the Court below as to the \$106,000 was wrong.

Plaintiff, not a noteholder at the time of the exchange offer; received her notes as a gift more than two years later on April 19 1934 (R. 16).

The exchange offer approved by petitioner was accepted by the holders of all the \$30,000,000 notes except those holding an aggregate of \$1,213,000 principal amount (including plaintiff's assignor). In the representative suit known as the *Hackner* case Eastman, who accepted the exchange offer, was held not entitled to recover on the ground that no trust existed, that the petitioner as fiduciary fully performed its duty, and that in any event Eastman suffered no damage. 43 F. Supp. 637, 130 F. (2d) 300, certiorari denied 317 U. S. 691 and 713. The author of the opinion in the instant case concurred in the *Hackner* case in the last ground only, viz. that accepting noteholders sustained no damage.

Statutes Involved

New York Civil Practice Act §10 provides:

"§10. Application of article.

"The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases:

1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.

2. A case where the time to commence an action has expired when this article takes effect. . . ."

Civil Practice Act §48 provides, so far as material:

"§48. Actions to be commenced within six years.

"The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article. (Am'd L. 1936, ch. 558, in effect Sept. 1, omitting 'an injury to property or' from subd. 3; cf. §49.)"

Civil Practice Act §53 provides:

"§53. Limitation where none specially prescribed.

"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In denying to petitioner the protection of the New York statute of limitations and in extending

the New York statute by "equitable" considerations (which) unknown to the substantive law of New York in like case.

2. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

3. In failing to observe and apply the substantive law of New York as to the existence of a trust, the effect of the exculpatory clause here involved, and the inability to sue of an assignee subsequent to the event.

4. In failing to give due effect to Rule 56 of the Federal Rules of Civil Procedure, 308 U. S. 647 at 734.

POINT I

The New York statute of limitations barred this action more than four years before its inception.

The purchase offer which plaintiff treats as a breach of trust was (as we have above stated) effective from October 29 to December 15 1931. This action was brought more than ten years later on January 22 1942 (R. 1).

A. Under the law of New York this action was barred on or before December 15 1937.

The six-year statute of limitations (as it stood before the amendment effective September 1 1936 which reduced to three years the liability for injury to property) had

completely barred this action at the time it was brought in the District Court in 1942. Under the law of New York there can be no controversy about this fact, as shown by Civil Practice Act §48 and the cases cited in the petition at p. 7 above. While respondent urged on rehearing in the Circuit Court of Appeals that the defense of limitations had not been "pleaded", the fact is that petitioner's motion for summary judgment was made before answer, as expressly permitted by Rule 56 (b), and that a motion before answer necessarily imports the right to obtain judgment upon any ground upon which it can be granted. *A. G. Reeves Steel Construction Co. v. Weiss* 119 F. (2d) 472, 476, certiorari denied 314 U. S. 677.

B. Disregard by the Court below of the statute of limitations of New York violates the principle clearly laid down for all United States courts in diversity cases by *Erie R. Co. v. Tompkins* and *Russell v. Todd*

Accepting for the purpose of discussion our contention with regard to the application of the New York statute of limitations (R. 103); the Court of Appeals held that it was not bound to follow the New York law against what it might deem to be countervailing "equitable considerations" (R. 103-115). The doctrine of unlimited Federal "remedial rights" which the majority below invoked to support this conclusion is of wholly novel impression since 1938 (the year of the decision in *Erie R. Co. v. Tompkins*), and is of itself sufficient, we submit, to require a review at the hands of this Court. It or something like it was argued in the briefs of counsel in *Russell v. Todd*, 309 U. S. 280, but was not made the subject of decision by this Court in that case. Upon analysis it will be found that the

attempt of the majority below to exclude the statute of limitations of the forum from the scope of *Erie R. Co. v. Tompkins* rests upon sweeping and obsolete dicta in a series of cases antedating 1938 and based upon the metaphysics of *Swift v. Tyson* 16 Pet. 1, which *Erie R. Co. v. Tompkins* overruled. As regards the few precedents cited in the majority opinion below of date in or after 1938, the fact would seem to be that the opinion of this Court in each instance was directed either to the Federal law applicable in a non-diversity case (such as *D'Oench, Duhme & Co. v. F. D. I. C.* 315 U. S. 447, discussed in footnote 42 of the majority opinion, R. 110) or to the historical background of Federal jurisdiction without regard to the limitations placed thereon by *Erie R. Co. v. Tompkins* in diversity cases (as in *Atlas Insurance Co. v. Southern, Inc.* 306 U. S. 563, 568, quoted in footnote 32 of the majority opinion, R. 105).

In *Russell v. Todd* 309 U. S. 280, this Court said at p. 289:

"But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and *in the absence of any state statute barring the equitable remedy in like cases*, the federal court is remitted to and applies the doctrine of laches as controlling [citations]." (Italics ours.)

At p. 290:

"The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal

cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, *unless it is applied to like causes of action in the state courts.*" (Italics ours.)

At p. 293:

"We take it that in the absence of a controlling act of Congress *federal courts of equity*, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act *adopt and apply local statutes of limitations* which are applied to like causes of action by the state courts. Cf. *Mason v. United States*, 260 U. S. 545; *Jackson County v. United States*, 308 U. S. 343. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action." (Italics ours.)

The Fifth Circuit Court of Appeals in *Roos v. Texas Co.* 126 F. (2d) 767, 768, has understood this decision to mean exactly what it says; namely, that applicable State statutes of limitation must be applied in Federal suits in equity exactly as at law, if so applied by the law of the State. The Second Circuit Court of Appeals has erroneously reached a different conclusion. In its memorandum addressed to counsel after receipt of the petition for rehearing, the Court expressed its belief as follows (R. 61):

"In the light of the statement in *Russell Todd*, 309 U. S. 280, 287, ('The Rules of Decision Act does not apply to suits in equity'), this court thinks that, as to state statutes of limitations in suits in equity, the doctrine remains what it was before *Erie v. Tompkins*, 304 U. S. 64."

Consideration of *Mason v. United States* 260 U. S. 545, 558 (cited in *Russell v. Todd*, quoted above) made it plain that the Rules of Decision Act was not decisive because merely declaratory of the rule already existing. Moreover, the opinion of the Second Circuit Court of Appeals in *Shultz v. Manufacturers & Traders Trust Co.*, 128 F. (2d) 889, 896, shows that the Court below understood *Russell v. Todd* to mean that an explicit applicable State statute must govern even a suit of exclusively equitable cognizance in the State courts. This Court denied certiorari, 317 U. S. 674.

Although concurring in the opinion of the Second Circuit Court of Appeals in the *Shultz* case, the author of the opinion below in the instant case (Frank J.) has sought to escape the plain meaning of *Russell v. Todd* and take the statute of limitations of the forum outside the rule of *Erie R. Co. v. Tompkins* by an accumulation of dicta from opinions of the Court prior to the overturn in *Erie R. Co. v. Tompkins* and by the elevation of footnotes above the body of the decision in *Russell v. Todd*. Thus the majority below suggests that the language of this Court which we have quoted from *Russell v. Todd* at pp. 20-1 above is somehow qualified by the citation of pre-1938 cases in footnote 1 at p. 288 of 309 U. S. (R. 108), although it would seem clear that the intention of the footnote was merely to provide historical background for the decision of the Court announced in the text.

Such a use by the majority below of recent precedents of this Court appears to us to justify notice here. Attention might also be called to the mode of reasoning adopted by the majority (R. 108) whereby opinions written for this Court by such justices as Brandeis J. and Holmes J. (both known to have been opposed to the theory of *Swift*

v. Tyson) are retroactively interpreted to have been, notwithstanding their being dated before 1938, entirely consistent with *Eric R. Co. v. Tompkins* because Brandeis J. in 1938 persuaded the majority to overrule *Swift v. Tyson*. Thus we find that, because Brandeis J. in *Benedict v. New York* 250 U. S. 321 (1919) cited with approval *Kirby v. Lake Shore, etc., R. Co.* 120 U. S. 130 (1887), and because Brandeis J. nineteen years later wrote the majority opinion in *Eric R. Co. v. Tompkins*, therefore *Eric R. Co. v. Tompkins* is held to mean that the New York statute of limitations need not be obeyed by a Federal court in equity (R. 109); or to put it in the language of the majority below:

"We find it impossible to believe that, speaking for the Court, he [Brandeis, J.] intended to overrule *Kirby* and *Pusey & Jones* in *Eric v. Tompkins* which nowhere mentions those cases or the doctrine which they embody."

We desire an opportunity to argue in this Court that *Eric R. Co. v. Tompkins*, even if it does not mention the cases cited, does overrule or distinguish the doctrine which they embody. The proposition seems to us perfectly plain, and is made evident by comparing the theory of Harlan J. in the *Kirby* case 120 U. S. at 138, that the equity jurisdiction of the Federal courts should be exercised "according to rules and principles applicable alike in every State" with the conclusion in *Eric R. Co. v. Tompkins* 304 U. S. at 79 (following Holmes J. in *Kuhn v. Fairmont Coal Co.* 215 U. S. 349, 372) that there is no Federal common law.

The majority below seek to rest their conclusion upon a theory which we believe particularly to deserve the immediate attention of this Court, viz. that there is a field of

"equitable 'remedial rights'" (R. 108) as to which, though substantive in character, Federal courts have independence even in diversity cases notwithstanding *Erie R. Co. v. Tompkins*, *Ruhlin v. New York Life Insurance Co.* and *Russell v. Todd*. The restriction imposed on this brief by Rule 38 of this Court prevents any real discussion of this theory here. We can here merely indicate that the authorities employed below to remove the local statute of limitations from the rule of *Erie R. Co. v. Tompkins* really turn upon an ambiguous use of the word "jurisdiction". When in *Robinson v. Campbell* 3 Wheat. 212 and in *Boyle v. Zacharie* 6 Pet. 648 and in *Payne v. Hook* 7 Wall. 425 the court urged the independence of Federal "remedial rights" as a reason for rejecting a State court practice or for following a practice not recognized in the State court, and when in like cases (R. 104, footnote) similar results were reached, it seems to us plain that the court had in view *practice* in equity and not substantive law. It is furthermore obvious that the language in these and similar decisions ante-dating 1938 could not have been used with reference to the principle announced in *Erie R. Co. v. Tompkins* and must be deemed overruled in so far as inconsistent with it.

The essential distinction which must be made in order to understand the pre-1938 precedents in the light of *Erie R. Co. v. Tompkins* is the distinction which the majority below has not made, i.e. that between the historic equity jurisdiction (or field of authority) and the rules or principles by which that jurisdiction shall be exercised. This distinction is plainly pointed out by this Court in *Mason v. United States* 260 U. S. 545, 557:

*But while the power of the courts of the United States to entertain suits in equity and to decide them

cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation."

The New York statute of limitations leaves unabridged the power of the courts of the United States to entertain suits in equity and to decide them. It merely determines the point at which defendant is entitled to be protected by the lapse of time. This defense constitutes a substantial right based upon sound public policy, as pointed out by this Court in *Guaranty Trust Company v. United States*, 304 U. S. 126, 136. While procedural in form, such a defense has a substantive content as fully as the local law concerning the burden of proof (*Cities Service Oil Co. v. Dunlap*, 308 U. S. 208) or the local law concerning the parol evidence rule (*American Seating Co. v. Zell*, decided in this Court May 9 1944, No. 613, reversing 138 F. [2d] 641).

The fact that the statute of limitations was procedural in its original concept may have led the majority below to believe that strict application of local limitations would impair the independence of the Federal courts in respect of "remedial rights". Yet it is to be noted that the New York statute in no way alters the *manner of enforcement* of such rights as the plaintiff York may have against the petitioner according to the most ancient Federal equity jurisprudence; it merely fixes the time beyond which those rights may no longer be enforced in the Federal or in the State courts.

Argument by the majority below (R. 108-9) from such cases as *Henrietta Mills v. Rutherford County* 281 U. S. 121 and *Pusey & Jones Co. v. Hansen* 261 U. S. 491, both decided before 1938, illustrates the inappositeness of the "remedial rights" doctrine to the question here of the

enforcement in a Federal equity court in a diversity case of the applicable statute of limitations of the forum. The authorities cited relate merely to *practice* in the Federal courts, holding in the former case that a State statute granting a right to proceed in equity not conferred by the Federal statutes could not enlarge the right to proceed in a Federal equity court and holding in the latter case that a State statute permitting appointment of a receiver upon application of a simple contract creditor did not enlarge the right to proceed in a Federal equity court.

But the statute of limitations, establishing a defense, and not purporting to confer a new remedial right, in no way enlarges the Federal practice in equity as established by the Constitution and statutes of the United States.

Even in exclusively equitable actions New York law rejects any reference to so-called "equitable principles" for the purpose of extending the statutory term of limitations. *Schmidt v. Merchants Dispatch Co.* 270 N. Y. 287; *Matter of City of New York* 239 N. Y. 220, 225; *Erickson v. Macy* 236 N. Y. 412, 415; *Gilmore v. Ham* 142 N. Y. 1; *Engel v. Fischer* 102 N. Y. 400; *Streeter v. Graham & Norton Co.* 263 N. Y. 39. Under the statutory scheme of limitations which has been in force in New York for almost 100 years, laches (whose principles the majority below has invoked, R. 114, as a reason for ignoring the New York statute) is no longer recognized as a defense in New York (with the unimportant exception of applications addressed to the discretion of the Court). *Pollitz v. Wabash R. Co.* 207 N. Y. 113, 130. In New York the defense of laches is available only to shorten (not to extend) the term limited by the statute of limitations in cases where the favor or discretion of the court is sought. *Groesbeck v. Morgan* 206 N. Y. 385, 389.

Yet laches is well understood to be a matter of substantive law affecting the right, not merely the remedy. *Menendez v. Holt* 128 U. S. 514, 523; *O'Brien v. Wheelock* 184 U. S. 450, 493. Hence the action of the majority herein in applying a doctrine of substantive law to rebut or repel the ordinary application of limitations pursuant to the statutes of the forum is a violation of the rule laid down in the *Erie* and *Ruhlin* cases and in many similar decisions of this Court.

C. Independently of the foregoing argument this action was barred in 1937 under the concurrent jurisdiction rule

As is pointed out in *Russell v. Todd* 309 U. S. at 289, when the jurisdiction of a Federal court in equity is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. The opinion of this Court cites numerous authorities in the Federal courts for this principle. The principle has long been recognized in the law of New York, as stated in *Keys v. Leopold* 241 N. Y. 189 at 193:

"When a legal and an equitable remedy exists as to the same subject-matter, the latter is under the control of the same statutory bar as the former. (*Rundle v. Allison*, 34 N. Y. 180.)"

The claim of the plaintiff York being essentially for money damages (whether for loss occasioned to the note-holders or for benefits claimed to have been received by petitioner, R. 12), it would seem clear that the jurisdiction of equity herein is concurrent only. The majority below seem to have taken three positions on this question. *First*

they said that whether the jurisdiction in equity is concurrent or exclusive must be determined by Federal decisions as to the Federal equity jurisdiction as it stood in 1787 or 1789 (R. 111). This argument we believe to rest on the misunderstanding as to the significance of the "historic equity jurisdiction" of the Federal courts, and on the failure to observe the distinction between the practice and the content of that jurisdiction, to which we have above referred. *Wilson v. Koontz* 7 Cranch 202 and the other authorities on concurrent jurisdiction cited in this Court's opinion in *Russell v. Todd* 309 U. S. at 289, seem to us to show clearly that a case like the instant case is one of concurrent jurisdiction under the Federal precedents. *Second*, the majority below said that it is of no moment whether the equity jurisdiction here is or is not exclusively equitable because *Kirby v. Lake Shore R. Co.* 120 U. S. 130 was a case of concurrent jurisdiction but still the Court disregarded the New York statute of limitations on the ground of defendant's alleged fraud (R. 112). We think the majority below errs in characterizing that case as one of concurrent jurisdiction since the Court there (p. 134) held that the equity jurisdiction arose because of the complicated nature of the accounts between the parties rendering a trial by jury "difficult, if not impossible." We have already called attention (p. 23 above) to the ratio decidendi of the *Kirby* case which renders it inconsistent with *Eric R. Co. v. Tompkins*. *Third*, the majority below said that in all the cases cited in *Russell v. Todd* in which the Court applied the local limitations statute in a situation of concurrent jurisdiction, either there was no showing of any inequitable conduct by defendant or there was a showing that plaintiff slept on his rights (R. 113); but this method of distinction is to ignore

the ground on which in those cases this Court expressly placed its decision, and illustrates the necessity of a review here in order to clear the confusion which has arisen on the subject.

The dissenting opinion of Judge Augustus N. Hand (R. 121-2) forcefully illustrates the disadvantages bound to follow, from the aspect of public policy, the majority's rejection of the statute of limitations of the forum and its anachronistic injection of "equitable" considerations as a means of avoiding that statute.

POINT II

The majority opinion below violates the rule of the *Erie* and *Ruhlin* cases in refusing to apply the substantive law of New York.

Apart from the question of limitations which consumes 13 pages (R. 102-15), the 51 pages of the majority opinion below are devoted principally to a discussion of the evidence in the record on summary judgment and of the various inferences which might be drawn from such evidence, none of which is relevant to this application for certiorari. On three points, however, the majority have clearly departed from the substantive law of New York.

A. As to the Existence of a Trust

Under the law of New York a *res* is one of the four essentials of a valid trust. *Brown v. Spohr* 180 N. Y. 201, 209; *Miller v. Guaranty Trust Company* New York Law Journal June 9 1942 p. 2246, affirmed 265 A. D. 1040, leave to appeal denied 291 N. Y. 829. The Second Circuit Court of Appeals on the same facts previously so held in

Hackner v. Morgan 130 F. (2d) 300, 303 (Frank J. not concurring on this point), cert. denied 317 U. S. 691, with the following statement:

"As we have said before, 'A trust involves a specific subject matter or res.' In *re United Cigar Stores Co.*, 2 Cir., 70 F. 2d 313, 315. See *Bradford v. Chase National Bank*, D. C., 24 F. Supp. 28, affirmed *Berger v. Chase Nat. Bank*, 2 Cir., 105 F. 2d 1001, affirmed 309 U. S. 632, 60 S. Ct. 707, 84 L. Ed. 990. Here there is nothing upon which a trust can be founded."

The majority in the instant case have sought to innovate upon this established law by arguing that, since *res* means only "thing", it can be an intangible such as a chose in action and that the powers conferred upon petitioner by the indenture could be characterized as "powers in trust" (R. 83). To characterize the powers conferred upon petitioner by the indenture as powers in trust equivalent to a *res* is an obvious departure from the substantive law of the forum, since the elements of the concept are clearly stated in *Broken v. Spohr* so as to exclude a power or chose in action. According to the Court of Appeals in that case, the *res* necessary to the existence of a trust must be (180 NY at 209).

"... a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee."

The segregated assets and assigned securities described and provided for in the Van Sweringen Corporation indenture were in no way transferred to petitioner as trustee or otherwise. Finally, the New York courts have in *Miller v.*

Guaranty Trust Company expressly held that powers conferred by security-holders upon a syndicate of agents who could exercise such powers in a fiduciary capacity only, are insufficient to constitute an express trust under the law of New York. Mr. Justice Shientag said at Special Term in that case:

"No express trust was established under the terms of the agreements entered into by the various parties. The defendants are not express trustees of a subsisting trust. There is an absence of all of the essential elements to be found in a trust of personal property (*Brown v. Spohr*, 180 N. Y., 201; *Gilmore v. Ham*, 142 N. Y., 1). The rights arising out of the agreements were contractual in nature."

B. As to the Exculpatory Clause

The indenture herein expressly provided that petitioner as trustee should not be liable for anything except its own "wilful misconduct" (*Hackner* record, p. 98). The proof on summary judgment showed, in the form of three affidavits of persons who participated in the transaction—such affidavits covering 35 pages (pp. 15-49) of the *Hackner* record and standing without contradiction—that the petitioner in approving the exchange offer acted with care, under legal advice, and with eminently proper and even laudable motives for the purpose of saving the position of the noteholders. The dissenting judge in his analysis of the evidence (R. 119-21) came to the same conclusion. This had been the conclusion of the District Court and the majority of the Court of Appeals in the *Hackner* case 43 F. Supp. 637, 130 F. (2d) 300. In reaching a different result, the majority in the instant case pointed to the fact that the petitioner had a dual position and a potential ad-

verse interest (R. 84-9), and remanded the case for trial so that evidence might be taken as to the disclosure made to non-accepting noteholders like York's assignor.

In coming to this result, the majority rejected the defense based on the exculpatory clause in the indenture (R. 98-101), notwithstanding the fact that in comparable circumstances a similar exculpatory clause was enforced and the trustee held not liable in *Hazzard v. Chase National Bank*, 159 Misc. 57, 257 A. D. 950, 282 N. Y. 652. In the *Hazzard* case, Rosenman J. (159 Misc. at 80-1, 83-4) clearly stated the law of New York to require the enforcement of an exculpatory clause in the absence of actual bad faith, notwithstanding the trustee's occupying inconsistent positions. The facts of the *Hazzard* case even as summarized in the opinion below (R. 99-100) were stronger against the trustee than the facts of the instant case.

Yet the majority refused to give effect to the substantive law of New York as illustrated in the *Hazzard* case on the remarkable ground that it lacks "precedential force here" (R. 100) because *after a trial* the facts *might* indicate bad faith on petitioner's part. This remarkable result can logically be explained on only one of two grounds, either of which would seem to justify attention at the hands of this Court. One ground might be that the Second Circuit Court of Appeals will not, in applying the doctrine of *Erie R. Co. v. Tompkins*, regard any case establishing the law of New York as having "precedential force" if any fact in that case is different from any fact in the case at bar. We do not assume this was the meaning of the language used here. The second ground might be that the evidence in the present record on petitioner's motion for summary judgment under Rule 56 is not sufficient to exonerate petitioner

of bad faith because further evidence might be found on a trial, and therefore the Court of Appeals will not be bound by the record made on summary judgment under Rule 56 in the same way as it would be bound by the record made upon a full trial. Since respondent stipulated the truth of the facts set forth in the affidavits on summary judgment and based her own cross-motion on them, any such treatment of this record can only result in an impairment of the efficacy of the procedure for summary judgment as established by the Federal Rules of Civil Procedure which this Court promulgated.

C. As to Plaintiff's Status as Assignee

The record is clear that plaintiff did not hold her \$6,000 of notes at the time of the exchange offer complained of but acquired them on April 19 1934 as a gift (R. 16). The substantive law of the forum is that such an assignee of obligations cannot bring suit in respect of transactions occurring before he acquired title; the cases are cited by the majority below with the statement that they "seem so to hold" (R. 101-2). But the majority avoid applying the New York law on the subject, with the statement that New York still permits a cause of action to be specifically assigned and that the present record does not show whether or not there was an assignment either "express or implied in fact" (R. 102).

This holding is contrary to the law of New York with respect to the burden of proof on the subject as set forth in the latest case cited by the majority, *Smith v. Continental Bank & Trust Company* 292 N. Y. 275, 279. There the Court of Appeals held that a bondholder asserting a cause

of action for damages against a trustee need not allege in his complaint that he was owner of the bonds at the time of commencement of the action, since even if he had assigned the bonds, he would retain the cause of action. The question arose on a motion directed to the sufficiency of the complaint. As to the suggestion that plaintiff might nevertheless have executed a specific assignment of the cause of action, the Court of Appeals held that the burden lay on the party who so asserted. (p. 279):

"It may be that the plaintiff's cause of action was transferred to the receiver of S. W. Straus & Co., Inc., pursuant to the order of the Supreme Court. That order is not before us nor are its terms alleged in the complaint. We assume, therefore, that nothing more than the bonds was transferred. An assignment would be necessary to transfer the right of action."

This Court in 307 U. S. 617 granted certiorari for refusal of the Fifth Circuit Court of Appeals to follow the law of Texas with respect to the burden of proof as to cloud on title, and upon review held that the Court of Appeals had erroneously failed to follow the substantive law of Texas: *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208. The same situation exists in this case. The procedure of the majority below also departs from proper practice under Rule 56 as illustrated by the opinion of the same Court in *Engl v. Aetna Life Insurance Co.* 139 F. (2d) 469:

POINT III

The fact that final judgment has not been entered is an additional reason for granting certiorari in view of the importance of the questions involved.

While the decision below is not final but only remands the case for trial, this is an additional reason for granting of certiorari at the present stage because of the importance of the questions above discussed and the misconceptions concerning them which, it is respectfully submitted, the Second Circuit Court of Appeals has adopted. The power of this Court to grant certiorari before final judgment is undoubted. Judicial Code, § 240 (a), as amended by the Act of February 13 1925 (43 Stat. 938, 28 U. S. C. § 347 (a)). *Gay v. Ruff* 292 U. S. 25, 28-31; *United States v. Gulf Refining Co.* 268 U. S. 542, 544-545; *Forsyth v. Hammond* 166 U. S. 506, 511-515; *American Construction Co. v. Jacksonville Railway* 148 U. S. 372, 384-385. In *Guaranty Trust Company v. United States*, 302 U. S. 681, this Court granted certiorari with respect to the decision of the Second Circuit Court of Appeals reversing a judgment obtained by defendant upon motion before answer on the ground of the statute of limitations only and directing a trial. On the subsequent review here the decision below was reversed, 304 U. S. 126.

If following a denial of certiorari at this time, the case is tried and petitioner prevails with respect to one or more of the various issues of good faith, disclosure or laches indicated by the Circuit Court of Appeals, the decision here sought to be reviewed will continue to be a source of embarrassment and confusion in the correct solution of the important questions involved.

CONCLUSION

This case involves matters of novel impression and of importance in the future application of the rule laid down by this Court in *Erie R. Co. v. Tompkins* and in the proper correlation of Federal and State law, which matters should be forthwith reviewed in this Court by writ of certiorari in order to avoid continuing confusion and litigation in the many cases of similar character which are constantly arising in the financial and mercantile center represented by the Second Circuit.

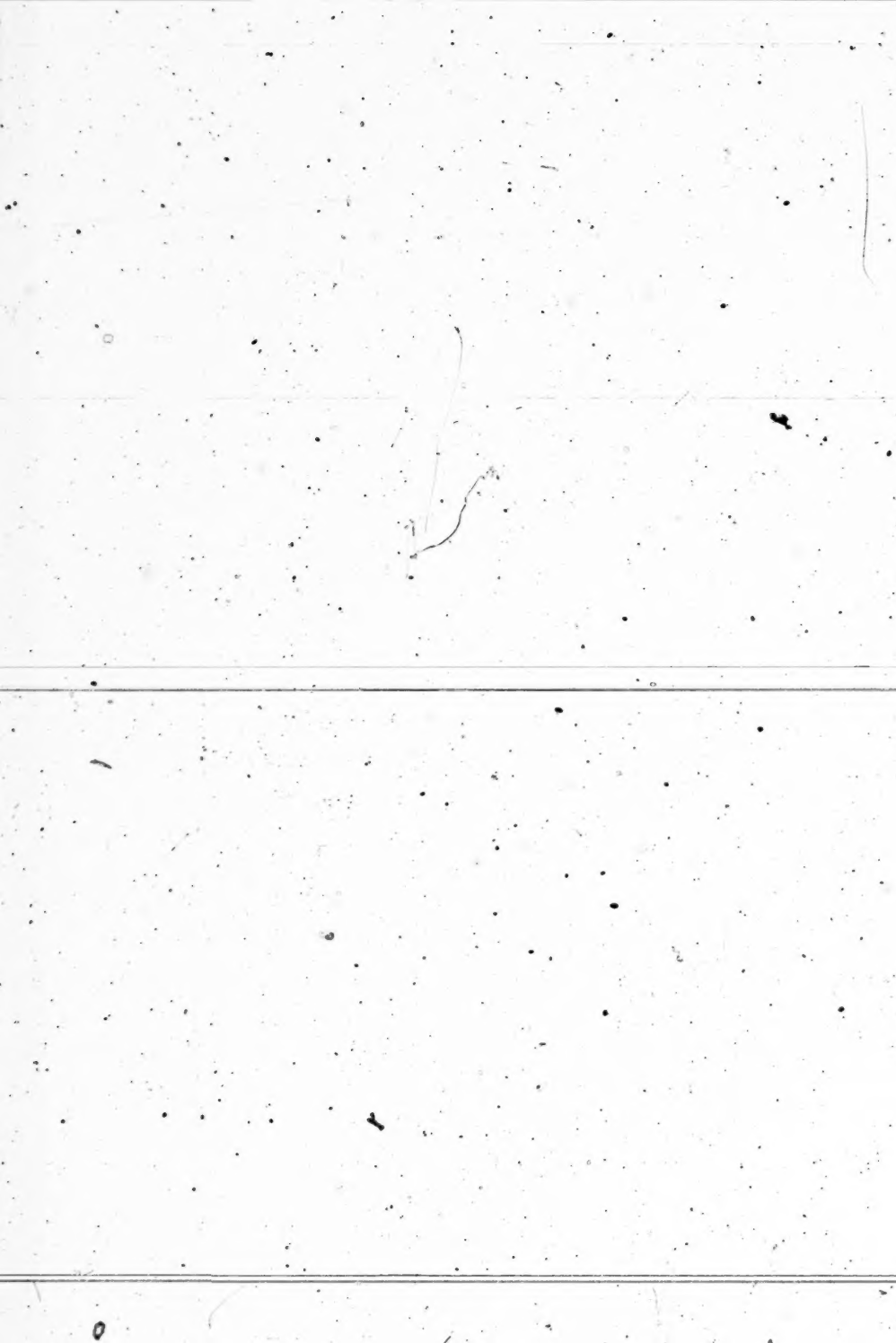
Respectfully submitted,

JOHN W. DAVIS

RALPH M. CARSON

-Counsel for Petitioner-

New York, N. Y., July 12 1944.



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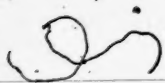
IN THE
Supreme Court of the United States

OCTOBER TERM 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

against

 GRACE W. YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

✓ JOHN W. DAVIS,
Attorney for Petitioner

THEODORE KIENDL,
RALPH M. CARSON,
FRANCIS W. PHILLIPS,
Of Counsel

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IN THE
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GUARANTY TRUST COMPANY OF NEW YORK,
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against

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Respondent.

No. 264

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R 23-5) is not reported. The revised opinion of the United States Circuit Court of Appeals for the Second Circuit (R 56-107) is reported in 143 F (2d) 503.

JURISDICTION

The order and judgment of the Circuit Court of Appeals for the Second Circuit was filed June 29 1944 (R 108). The petition for a writ of certiorari was filed July 17 1944 and was granted on October 9 1944 (R 109) limited to the first question presented by the petition for

the writ". The jurisdiction of this Court rests upon Judicial Code §240(a), 28 USC §347(a), as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?¹

STATEMENT OF THE CASE

Respondent Grace W. York instituted this as a class action on Behalf of \$1,213,000 principal amount of an issue of \$30,000,000 principal amount of notes of Van Sweringen Corporation dated May 1 1930 and matured May 1 1935, the summons and complaint having been filed January 22 1942 (R 1). This is a diversity case. Plaintiff is a citizen of Pennsylvania and defendant is a citizen of New York (R 2). Plaintiff owns \$6,000 principal amount of the issue of notes which she claims to represent, having received them as a gift on April 19 1934 (R 2, 16).

The substance of the claim is that petitioner as trustee under a trust indenture executed by Van Sweringen Corporation on May 1 1930 did not properly protect assets of the debtor segregated in the possession of the debtor for the benefit of noteholders, in that the trustee about October 29 1931 sponsored an exchange offer made by the debtor,

¹ The questions presented by the petition were eight in number (pp. 6-7). Nos. 4-8 related to other questions of substantive law excluded from review under this writ. Nos. 2-3 related to variants of the first question (above stated). In discussing the first question in the following brief, we from time to time discuss the variants also.

and as creditor of the debtor's affiliates in respect of a bank loan permitted certain collateral for the loan to be released from the lien thereof in order to permit the making of the offer, which the respondent's donor did not accept (R 3-11).

The trust indenture under which plaintiff York's notes were issued is reprinted at pp. 75-105 of the record filed in this Court in *Eastman v. Guaranty Trust Company* upon application by the plaintiff in that case (also a noteholder under the indenture) for certiorari, which was denied 317 US 691 (October Term 1942, No. 516). (The record in the *Eastman* case [also referred to as the *Hackner* case] has been stipulated by the parties herein to be part of the record in this Court, R 16.) This trust indenture imposed certain duties and conferred certain powers on petitioner as trustee, but expressly limited its obligations and provided that it should not be liable for anything in connection with the trust except for its own "wilful misconduct" (Hackner record, p. 98). The petitioner as trustee was not given custody or possession of any *res*, and the notes were not made a lien on any assets (R 57, 143 F [2d] at 505).

In October 1930 petitioner with other banks constituting a group, made large advances to two corporations affiliated with the obligor Van Sweringen Corporation, and controlled by the two Van Sweringen brothers personally. The collateral for these advances included the common stock of Van Sweringen Corporation. Petitioner's participation in these loans was motivated largely by its desire to protect the noteholders against a threatened default at that time (Hackner record, p. 21).

The grievance of plaintiff York is that in October 1931 petitioner consented to and assisted in a plan for exchange of the notes for 50 cents on the dollar in cash and delivery of 20 shares of the obligor's common stock against each

note. The reasons why petitioner approved this procedure as being in the interests of the noteholders are fully set forth in three affidavits filed in the *Eastman* case (Hackner record, pp. 15-49) and made a part of the York record (R 16). It is unnecessary for purposes of review in this Court to set forth these details.

The previous *Eastman* action had been brought in the District Court by a noteholder who had accepted the offer of exchange. That action was dismissed on the present petitioner's motion for summary judgment, *Eastman v. Morgan* 43 Fed. Supp. 637. The dismissal was affirmed by the Second Circuit Court of Appeals, 130 F(2d) 300. The author of the opinion in the instant case, Frank J., was a member of the Court which so affirmed the judgment of dismissal, but concurred in the affirmance on the question of damages only, holding in effect that a noteholder who had received by virtue of the offer, which petitioner as trustee sponsored, 53% of the face value of his notes was not injured by the petitioner's action (130-F[2d] at 303). The majority of the Court held in addition that there was no evidence of representations by the present petitioner to the plaintiff Eastman (the original action having been framed in deceit) and further that as a matter of law there was no breach of trust because no trust existed in the absence of a *res*. This Court denied certiorari, 317 U.S. 691; and denied rehearing of the application therefor, 317 U.S. 713.

York, the respondent herein, is the donee or assignee of a noteholder who did not accept the exchange offer. Her separate suit² against the petitioner was commenced Janu-

²On May 22 1940 in alleged pursuance of Rule 15(a) of the Federal Rules of Civil Procedure the plaintiff in the *Hackner* case served a notice purporting to add York and Eastman as par-

ary 22, 1942. The petitioner as defendant therein moved, before answer, for summary judgment on the basis of the prior decision on July 9, 1943, which motion was granted by the District Court (R 23-5). The decision of the District Court was predicated on the prior decision of the Court of Appeals with respect to breach of trust, although the defense of limitations was also argued by the defendant.³

On appeal from the judgment of dismissal the Second Circuit Court of Appeals (Frank J. again participating but the other members of the Court being different) overruled the prior decision of the Court on substantially the same

ties plaintiff. This notice was returned by the defendant on May 23, 1940. In the opinion of the Second Circuit Court of Appeals dismissing the *Hackner* case for want of jurisdiction, it was held that Federal jurisdiction did not exist as to York, but that the notice on behalf of Eastman might be treated as the institution of a new suit by Eastman. *Hackner v. Guaranty Trust Company*, 117 F (2d) 95, certiorari denied 313 US 559. As to York the service of the notice on May 22, 1940, whatever its effect under the Federal rules, did not for purposes of the New York Civil Practice Act §23 toll the statute of limitations, since the cause of action in the *Eastman* (*Hackner*) case was radically different from the cause of action in the *York* case. See opinion of Leibell, D.J. in the *York* case April 27, 1942 at p. 5 of respondent York's petition in this Court for amendment of the record; and *Streeter v. Graham & Norton Co.*, 263 NY 39.

³While respondent argued that the defense of limitations is not available on the motion for summary judgment, because not "pleaded" (see brief in opposition to petition for certiorari herein, p. 11), the motion for summary judgment before answer is expressly permitted by Rule 56(b), and a motion before answer necessarily imports the right to obtain judgment upon any ground upon which it can be granted. *A. G. Reeves Steel Construction Co. v. Weiss* 119 F (2d) 472, 476, certiorari denied 314 US 677. The Court below proceeded on this theory in discussing the statute of limitations and the doctrine of laches.

record; held that a trust existed; and held that a trial was required as to the existence and extent of a possible breach of trust, and that no other substantive question in the record warranted an affirmance. On defendant's petition for rehearing and to amend the opinion. (R 35-53) the Court of Appeals received briefs from the parties, recalled the original opinion, and substituted a revised opinion (R 55). The petition for rehearing was denied (R 55). The revised opinion appears at R.56-107, 143 F(2d) 503.

With respect to the revised opinion of the Court of Appeals, the writ of certiorari permits argument here only of the question of limitations, which is treated in section 11 of the opinion, R 88, 143 F(2d) at 521. In addition the revised opinion of the Court of Appeals discusses or remits for consideration by the District Court upon a trial other questions of substantive law; such as (a) the existence of a trust upon the facts as to which other judges in the same Court had held there was no trust, (b) the motives of the petitioner as trustee, (c) the question of disclosure, (d) the effect of the exculpatory clause in the indenture, and other questions.

In connection with the revision of the opinion and the petition for rehearing one of the judges who had concurred in the original decision, A. N. Hand Cir. J. dissented, stating in part (R 104-6, 143 F [2d] at 529-31):

"Upon reconsideration of this case on the petition for rehearing, I have become convinced that we seriously erred in our original decision . . . But aside from any question as to the merits of plaintiff's claim, I see no sufficient reason for not holding it barred by the New York statute of limitations . . ."

SPECIFICATION OF ERRORS

The error assigned, in so far as permitted to be reviewed by the present writ, is that the Circuit Court of Appeals failed to apply the New York statute of limitations which would have been applied by the New York courts to bar the claim.

SUMMARY OF ARGUMENT

1. The New York statute of limitations is completely determinative of this action.

2. The New York statute of limitations as applied by the New York courts to like actions brought in equity is part of the substantive law of New York which must be applied by Federal courts of equity in New York in diversity suits.

3. The doctrine of "remedial rights" invoked by the Court below to avoid application of the New York statute of limitations rests upon an erroneous construction of the Judiciary Act of 1789 and upon authorities subsequently overruled by this Court.

I

The New York statute of limitations is completely determinative of this action.

The New York Civil Practice Act §48 subd. 3 (prior to the amendment thereof effective September 1-1936 which reduced the period to three years and transferred the provision to §49) provides, so far as material:

"The following actions must be commenced within six years after the cause of action has accrued. . . ."

3. An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this article. . . ."

The term "injury to property" is defined by the General Construction Law §25a as "an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract."

New York Civil Practice Act §53 provides:

"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Section 11 of the Civil Practice Act provides that the periods of limitation prescribed by the article relating to limitations "must be computed from the time of the accruing of the right to relief by action" to the time when the claim to relief is actually interposed by the plaintiff.

Section 10, contained in the same article of the Civil Practice Act, provides:

"The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases:

1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.

2. A case where, the time to commence an action has expired when this article takes effect." (Italics ours.)

"Since about 1848 the scheme of statutory limitations introduced into New York law by the Field Code has been complete and exclusive. As was said by the Court of Appeals in *Gilmore v. Ham* 142 N. Y. 1, 6:

"Under the law of this state there is a fixed limitation for every cause of action, whether legal or equitable. After attaching suitable limitations to numerous classes of actions the Code adds (§388): 'An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.' This provision, in the Code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. (*De Pierres v. Thorn*, 4 Bosw. 288, 289; *Loder v. Hatfield*, 71 N. Y. 104.) So far as I have examined the authorities in this state since the adoption of the Code I have found no denial of the application of its provisions to any form of equitable action, unless cases of a continuing right, accruing newly every day, may be said to form an exception (*Miner v. Beckman*, 50 N. Y. 343; *Schoener v. Lissauer*, 107 id. 117), although it is quite apparent that they are not inconsistent with the uniform and universal rule."

The result is that the ancient equity principle of laches, which was nothing but a device of the chancellor to remedy

¹*Gilmore v. Ham* has since been cited with approval in *Ford v. Clendenin*, 215 NY 10, 16 (1915) and *Hanover Fire Insurance Co. v. Morse Dry Dock & Repair Co.* 270 NY 86, 89 (1936).

inequity created by lapse of time in connection with stale claims, has in New York been superseded with respect to every type of application except those which appeal to the grace or discretion of the chancellor. These are subject to be cut down to periods shorter than the ordinary period of limitations, by reason of equitable considerations of laches, as pointed out in *Groesbeck v. Morgan* 206 N. Y. 385, 389.⁵

Thus a complete statutory framework subsisting in New York since approximately the date of *Swift v. Tyson* 16 Pet. 1, excludes the equitable considerations of laches from calculations of the lapse of time with respect to defenses against claims of right, even though undue delay may within shorter periods of time bar applications to the favor or discretion of the court. Moreover, the New York court has made it clear that as between the six-year and the ten-year statutes of limitation the plaintiff cannot acquire the benefit of the ten-year period by casting his claim in an equitable form if he could obtain a complete remedy at law. In *Keys v. Leopold* 241 NY 189 the court held that the six-year limitation applied to an action by a customer against a broker with respect to the proceeds of her account, saying (p. 192):

"The mere fact that this is an action for an accounting is not determinative of this question. When a legal and an equitable remedy exists as to the same subject-matter, the latter is under the control of the same statutory bar as the former. (*Rundle v. Allison*, 34 N. Y. 180.) Nor is the fact that the defendants received this money in a fiduciary capacity and may, therefore, hold it under such a trust as the law may imply for the purposes of justice. (*Mills v. Mills*, 115 N. Y. 80.)"

⁵See also *Calhoun v. Millard* 121 NY 69, 82. Cf. *Paterson v. Hewitt* 195 US 309, 319. Also *v. Riker* 155 US 448, 460-1.

The obverse of the rule appears in *Hanover Fire Insurance Co. v. Morse Dock & Repair Co.* 270 NY 86, 90, which applied the ten-year statute with respect to an action to reform insurance policies on the ground that they were obtained by fraudulent concealment; the court held that the insurers' right in equity to reform the policies did not correspond to any right on their part at law to recover damages for fraud since they had suffered no damage, and that the right to interpose the defense of fraud in a subsequent action by the insured on the policies was not the equivalent of a right by the insured to proceed at law. Where, however, the essence of the action is one to obtain relief on a ground specified in the Civil Practice Act, such as those of §48, extraneous allegations of fraud will not persuade the New York court to apply some other period of limitations, since with respect to limitations that court looks "for the reality and the essence of the action and not its mere name". *Brick v. Colin-Hall-Marx Co.* 276 NY 259, 264.

Although derivative and representative actions are an established head of equity jurisdiction in New York and such an action by a minority stockholder belongs to the corporation (*Flynn v. Brooklyn City R. Co.* 158 NY 493, 508), the New York courts consistently apply the six-year statute of limitations to derivative actions where the corporation, if it were the plaintiff, could have recovered at law.

Potter v. Walker, 276 NY 15;

Singer v. Carlisle 26 NYS (2d) 172, affirmed
261 AD 897, appeal denied 285 NY 863;

Kalmanash v. Smith 291 NY 142, 159;

Corash v. Texas Company 264 AD 292;

Dunlop's Sons, Inc. v. Spurr 285 NY 333;

Cwerdinski v. Bent 281 NY 782;

Goldstein v. Tri-Continental Corporation 282 NY 21;

Hastings v. Bylesby & Co. 293 NY 413, 417.

In the *Dunlop* case, where the corporation had paid \$95,500 for a plant purchased by it from a director who had paid therefor \$80,500, the plaintiff stockholder demanded an accounting from this director for profits, and on this basis the Special Term applied the ten-year statute of limitations. The Appellate Division however said in reversing (259 AD at 235):

"What we have in this case is a claim for the return to the corporation of a loss suffered by the corporation. The amount of the loss is the same as the amount of the so-called 'profit' received by the defaulting officers and directors. The wrong done to the company is no different from the wrong done to a corporation when an excess salary is paid to an officer or when gifts are made to strangers or when bonuses are wrongfully paid. The exact amount of the loss is known.⁶ Though the pleader may call this loss to the corporation a 'profit' to the unfaithful fiduciary which ought to be accounted for, the pleader's characterization of the resulting legal situation with the intention of producing the application of a particular Statute of Limitations

⁶Where, however, the exact amount of the loss is not known, the same rule is applied. *Cwerdinski v. Bent* 281 NY 782, involving alleged excessive payments under a corporate bonus plan for the determination of which an accounting of the entire corporate income would be required.

is not binding in any way on the court. The wrong pleaded is not a claim for profits in the sense in which that term is properly used in stockholders' actions."

The Court of Appeals affirmed.

In the *Singer* case, the Special Term (affirmed without opinion by the Appellate Division) held that defendant directors and third parties were entitled to the six-year statute of limitations with respect to a claim that they had conspired to divert to the third parties underwriting profits which belonged to plaintiff's corporation. The Court said (26 NYS [2d] at 177), after quoting the above language from the *Dunlop* case:

"In the same way, any monetary benefits which the defendants obtained to the exclusion of the United Corporation represent merely the losses occasioned to the corporation and the moneys which the corporation would have received but for the defendants' improper neglect of their duty to obtain the underwriting business. Despite the fact that the defendants would be entitled to credit for their expenses in connection with the business which the United Corporation subsidiary should have had, the amount of the corporation's loss in respect to each transaction is definite and ascertainable in an action at law. In its nature and effect the claim is one for money damages at law."

Even if the third-party defendants as bankers received some benefit, the action continued to be one for waste or negligence, subject to the bar of the six-year statute, in the opinion of the Court in *Singer v. Carlisle*. See also to the same effect *Lyon v. Holton* 172 Misc 31, 35, affirmed

259 AD 877, modified in other respects and affirmed 286 NY 270.

Unquestionably the nature of the respondent York's claim is for loss sustained by her by reason of the negligence and misfeasance of petitioner as trustee. The extensive analysis of the facts made by the majority in the Circuit Court (R. 64-7, 82, 143 F [2d] at 509-11, 518) makes clear that plaintiff's claim, as conceived by that Court, is based upon petitioner's having occasioned a money loss to *non-accepting* noteholders⁷, whether on the ground of negligence, inadequate disclosure, or adverse interest. The Court below found that petitioner did not actually receive any profits, although finding that it allowed an affiliate of the debtor to obtain moneys that might not otherwise have been obtained and although finding that petitioner might have had an expectation of profit (R 68, 143 F. [2d] at 511). In other words, the plaintiff York's claim, even as envisaged by the Court below in outlining the possibilities upon which a trial court might act, is formulated as a claim recoverable at law for money damages. That the six-year statute of limitations would be applied by the New York courts to actions of this character is apparent not only from the authorities above cited but from those which hold that actions at law may be brought against indenture trustees for damages resulting from misconduct on their part in the performance of trust duties. *Savings Bank of New London v. New York Trust*

⁷ *Accepting* noteholders were held in the prior case (43 F Supp 637, affirmed 130 F [2d] 300, certiorari denied 317 US 691) to have suffered no loss at all. This apparently remains the view of the judges who participated in the instant case, with reference to *accepting* noteholders (see R 69, 82).

Co. 27 NYS (2d) 963 (suit against indenture trustee); *Ansbacher v. New York Trust Co.* 280 NY 79 (suit against indenture trustee). See also *Empire Square Realty Co. v. Chase National Bank* 181 Misc 752, affirmed 267 AD 817, leave to appeal denied by the Court of Appeals in April 1944.

Moreover, application of the New York six-year statute of limitations to actions in equity is familiar to the Federal courts in New York. *Michelsen v. Penney* 135 F [2d] 409, 414-5 (CCA 2, 1943); *Winkelman v. General Motors Corporation* 44 F Supp 960, 967; *Goldboss v. Reimann* 55 F Supp 811, 819, affirmed 143 F (2d) 594 (CCA 2 1944, adopting the opinion of Bright, D.J. below); *Shultz v. Manufacturers & Traders Trust Co.* 128 F [2d] 889, 896 (CCA 2, 1942), certiorari denied 317 US 674*.

In her brief in opposition to certiorari (p. 12) respondent cited as supporting application of the ten-year statute of limitations in a derivative action an opinion of Special Term in *Heller v. Boylan* 29 NYS (2d) 653, 699. But respondent omitted to note that on application for reargument this portion of the opinion was withdrawn by the Court (pp. 703-4). Respondent also cited a decision of Special Term in *Turner v. American Metal Co.* 36 NYS (2d) 356, which was subsequently reversed on other grounds in 50 NYS (2d) 800. The opinion of the Appellate Division there reported stated that the ten-year statute, by which the Court held the claim to be barred, applied to an action to impress

* Frank J. who concurred with a separate opinion in the case cited, rejects the application we here make of it, with a statement that "those portions of our opinion were in no way necessary to the decision, and we do not feel bound by them here." (footnote 48a at R 99, 143 F [2d] at 527).

a constructive trust upon specific property. This, as has been shown, is not the present case.

But even if the present action were to be deemed one cognizable exclusively in equity (as this Court held a remedy under the Federal Farm Loan Act to be, *Russell v. Todd* 309 US 280), nevertheless it would seem clear that the lapse of more than ten years between the close of the exchange offer on December 15 1931 and the institution of this action on January 22 1942 completely barred the suit under the express provisions of Civil Practice Act §§10 and 53. Judge A. N. Hand in the Court below held the action barred by the ten-year statute, Civil Practice Act §53 (R 106, 143 F [2d] at 531). The majority, while accepting arguendo petitioner's contentions as to the statute of limitations under New York law, held that intervening "equitable considerations" forbade or might forbid application of the statute as it would be applied in the law of New York.

II

The New York statute of limitations as applied by the New York courts to like actions brought in equity is part of the substantive law of New York which must be applied by Federal courts of equity in New York in diversity suits.

Although the statute of limitations destroys the remedy without impairing the right (*Lightfoot v. Davis* 198 NY 261), it yet remains a part of substantive law both because the defense of limitations is determinative of an action and because it is rooted in sound and well-established public policy. In Roman law the principle goes back to the Insti-

tutes of Gaius, and in the English law to 21 Jac. 1. c. 16 (1623). In 1702 the Court of Kings Bench described the statute of limitations as that "on which the security of all men depends". *Green v. Rivett* 2 Salk. 422. The New York courts emphasize the practical considerations applied to the administration of justice which demand that legal disputes be settled while evidence is readily obtainable, and point to the public interest in the outlawing of stale claims. *Brooklyn Bank v. Barnaby* 197 NY 210, 227; *Schmidt v. Merchants Despatch Transportation Co.* 270 NY 287, 302. In *Bell v. Morrison* (1828) 1 Pet. 351, 360, Mr. Justice Story characterized the statute of limitations as

"... a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation; by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlement of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

This view has been again and again reiterated in this Court. See particularly *Campbell v. Haverhill* 155 US 610, 617; *United States v. Oregon Lumber Co.* 260 US 290.

The running of limitations thus constitutes an infirmity in the barred claim which accompanies it through every assignment; and prevents suit thereon by the assignee even though he be the local sovereign. *United States v. Buford* 3 Pet. 12, 30; *King v. Morrell* 6 Price 24, 28, 30; *Guaranty*

Trust Company v. United States 304 US 126. With reference to the considerations of public policy which permit assertion of the statute of limitations even against a friendly foreign sovereign, this Court said in the case last cited (p. 136):

"The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest. [Citations] Denial of its protection against the demand of the domestic sovereign in the interest of the domestic community of which the debtor is a part could hardly be thought to argue for a like surrender of the local interest in favor of a foreign sovereign and the community which it represents."

In respect of the function it performs, the statute of limitations based upon the act of James I has exactly the same quality as the equitable defense of laches. In the case of laches as in that of limitations the dominant consideration is the wrong done the adverse party by delay; the only difference being that in the case of laches the ascertainment of the wrong rests upon an *ad hoc* determination of the chancellor, while in the case of limitations it is a generalized determination by the legislature of the forum. As this Court recently said in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.* 321 US 342, 348:

"Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber

until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the *right to be free of stale claims* in time comes to prevail over the right to prosecute them." (italics supplied)

See also *Menendez v. Holt* 128 US 514, 523; *Gallagher v. Cadwell* 145 US 368, 371; *Hammond v. Hopkins* 143 US 224, 250. Rule 8 of the Federal Rules of Civil Procedure as approved by this Court pursuant to the Act of June 19 1934, 48 Stat. 1064, provides in subdivision (c) for the pleading of affirmative defenses, including laches and limitations among others. The Rules say nothing as to what the contents of these defenses shall be. Evidently this Court considered that laches and limitations, like the other defenses specified, were matters of substantive law which in diversity cases are controlled by the law of the State of the forum.

In other words, the New York statute of limitations which excludes equitable considerations from any computation of the lapse of time, is nothing but the fixed equivalent as determined by the legislature, of the various lapses of time which the chancellor was wont to calculate for particular cases as determinative of rights in equity. In the courts of New York, it is clear, no litigant can prolong the term granted him by the law for the commencement of an action on his claim by invoking the "equitable principles" which the majority below would import into the New York statute (R 98, 143 F[2d] at 527). Delay in the accrual of a cause of action is indeed provided by New York law

through a formula of its own, clearer and more limited than the old conception of "equitable principles", in the shape of fraud defined by the cases as the equivalent of common law deceit.⁹ But that is the limit of any variation which New York law permits on the basis of equitable principles.

Hence it is obvious, that the decision below, which assumes to extend the six-year or the ten-year period of limitations fixed by the legislature of the forum, through concepts of "inequitable conduct" not recognized in the State courts for any such purpose, is a plain deviation from the substantive law of the forum. It opens to litigants in the Federal courts loopholes in the defense of limitations which do not exist in the State courts and, by reason of the determinative nature of this defense, will make the choice of jurisdictions decisive for certain types of claim. Through these loopholes will reappear the very evils which the rule of *Erie R. Co. v. Tompkins* 304 US 64 was intended to obviate, as is clearly pointed out by Judge A. N. Hand in his dissent (R. 107, 143 F[2d] at 531) and

⁹Civil Practice Act §48, subd. 5, in connection with which see *Cohen v. City Company* 283 NY 112, 117; *Brick v. Cohn-Hall-Marx Co.* 276 NY 259, 264-5; *Carr v. Thompson* 87 NY 160; *Druckerman v. Harbord* 31 NYS (2d) 867, 870. These cases establish that subd. 5 governs only when actual, not constructive, fraud is the gravamen of the action. The *Druckerman* case (inadequately presented at pp. 14-5 of respondent's brief in opposition to certiorari) specifically referred in this connection to the requisites of common law deceit as set forth in *Reno v. Bull* 226 NY 546. Clearly fraud is not the gravamen of the York complaint. The former plaintiff Eastman did formulate her claim as one in deceit, and it was in this form that the original claim was dismissed on summary judgment (43 F.Supp 637, 130 F [2d] 300, certiorari denied 317 US 691), for the reason in part that Eastman's own testimony on deposition showed that she had no basis for a claim of fraud against the petitioner as trustee.

by Moore's Federal Practice in its note on the case (Vol. 1, 1944 Supp. p. 408-10).¹⁰ Litigants will thus be again in the situation where

" . . . the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side" (*Klaxon Co. v. Stentor Co.*, 313 US 487, 496);

and in the old "inadmissible" position

" . . . that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship" (*Fidelity Trust Co. v. Field*, 311 US 169, 180).

The innovation introduced into the New York law by the decision below with reference to "a statute of limitations is vividly illustrated by that decision itself." All the acts complained of by the plaintiff York took place in 1931, between October 29 when the offer of exchange of Van Sweringen Corporation notes was made and December 15 when it expired (R 65, 76). This action was commenced more than ten years later, on January 22 1942 (R 1). Even at that late date the view of the Second Circuit Court of Appeals as expressed on the basis of substantially the same record here presented (*Eastman v. Guaranty Trust Company* 130 F [2d] 300, August 4 1942) was that no trust existed and that there had been no breach of trust by the

¹⁰Moore's note concludes: "A state statute of limitations is an embodiment of a substantial rule of policy, and there is no reason why it should be applied in a law action, and flaunted in an equity suit. To hold otherwise invites litigants to jockey for position in the federal courts."

present petitioner. That view was reversed in the instant case in 1944 largely on the basis of two other holdings in the interval (R 70). The petitioner was remitted to a trial with respect to its possible breach of trust, which trial will turn in great part on proof now to be taken on *real estate valuations and stock valuations as they stood some 13 years before the decision* (see discussion by the majority at R 73-80, 143 F [2d] at 514-7).

The expense and trouble to which the trustee will be put by a trial of this type of issue in this condition of staleness, immediately suggests itself, and occurred to the Court below. It is this very kind of thing which the policy of limitations is directed against. The explanation given by the Court below, however, is interesting. The majority says that the trustee could have caused liquidation of the debtor in 1931, and probably also liquidation of the debtor's subsidiary; that a substantial recovery on a claim against the subsidiary "might have resulted"; that this recovery might perhaps not have yielded the noteholders an amount equal to that available to them under the plan of exchange sponsored by the trustee, but that on the other hand it might have, "although apparently the trustee did not think so"; that "no one now can estimate with any high degree of accuracy" what the recovery might have been; but that if the trustee wrongfully failed to bring about the liquidation, it cannot avail itself of the difficulty of proof, because the "wrong-doer" must take the risk of the uncertainty (R 81, 143 F [2d] at 517). Thus the "wrong-doer" is assumed to be a wrong-doer for the purpose of putting him to the burden of proof which the Court, 13 years after the event, now determines (one judge dissenting and two judges in the same Court of the contrary opinion) to be indispensable to clear himself of the pre-

sumption of his being a wrong-doer. This manner of reasoning vividly recalls Selden's view of equity as "a roguish thing."¹¹ No wonder that the concept of laches to be measured by equitable standards of this character, has ceased to be part of the law of New York.

While we do not know any decision in this Court since 1938¹² holding the statute of limitations to be a part of substantive law (apart from the clear intimation in *Russell v. Todd*; see at pp. 52-3 below), this Court has in various comparable situations applied the standard of *Erie R. Co. v. Tompkins*.

Cities Service Oil Co. v. Dunlap 308 US 208
(burden of proof);

Klaxon Co. v. Stentor Co. 313 US 487 (conflict of laws);

Palmer v. Hoffman 318 US 109, 117 (contributory negligence);

American Seating Co. v. Zell 322 US 709
(parole evidence rule).

In *Cities Service Oil Co. v. Dunlap*, which is cited with approval in *Palmer v. Hoffman*, this Court held that the Fifth Circuit Court of Appeals had offended against the doctrine of *Erie R. Co. v. Tompkins* by declining to follow

¹¹*Table Talk of John Selden* (ed. Bollock 1927), p. 43: "Equity in law is the same that the spirit is in religion, whatever one pleases to make it. Equity is a roguish thing, for law we have a measure [and] know what to trust to. Equity is according to the conscience of himself that is chancellor, and as that is larger or narrower so is equity. It is all one as if they should make the standard for the measure we call a foot to be the chancellor's foot." etc.

¹²For holdings by this Court on the point prior to 1938 see the discussion at p. 40 below; particularly *Dupree v. Mansur* 214 US 161.

the rule of the Texas courts prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser. The action was one to remove a cloud on title, and the question of the proper rule as to burden of proof arose on respondents' cross-bill. Plaintiff denied the allegations of the cross-bill and claimed to be a bona fide purchaser for value without notice.

On an issue of this character, under the laws of Texas, the burden of proof is on the party who attacks the legal title. The Fifth Circuit Court of Appeals acknowledged this to be the law of Texas but felt entitled to apply a different rule, which it deemed better, because the Circuit Court believed the issue to be one merely of practice and not of substantive law. In the words of the Circuit Court (quoted in 308 US at 212),

"This seems to us a matter of practice or procedure and not a matter of substantive law. There is no question as to what are the rights of a bona fide purchaser, or as to whether the facts established make complainant out such, but only a question of how and by whom the facts shall be shown to the court. Such matters are not within the decision in *Eric R. Co. v. Tompkins*, and the cases following it.

The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling."

In reversing the Circuit Court, this Court said in a unanimous opinion (p. 212):

"We cannot accept the view that the question presented was only one of practice in courts of

equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only."

If this is so on questions of burden of proof and the other types of question dealt with in the late decisions above cited, we submit there can be no doubt that the statute of limitations, which is so firmly rooted in local public policy and which, in contrast to the rule as to burden of proof, is made by local law determinative in all cases where it applies, is a part of the body of local substantive law contemplated by *Erie R. Co. v. Tompkins*.

III

The doctrine of "remedial rights" invoked by the Court below to avoid application of the New York statute of limitations rests upon an erroneous construction of the Judiciary Act of 1789 and upon authorities subsequently overruled by this Court.

Disregard by the Circuit Court of the New York statute of limitations applicable to this case, rests upon a doctrine of what is called "equitable 'remedial rights'", explained and discussed at length in the opinion below (R 88-101, 143 F [2d] at 521-28). The conclusion seems to be based essentially on a case which we believe to be overruled (*Kirby v. Lake Shore etc. R. Co.* 120 US 130) and on a case which we suggest the Court below has misunderstood (*Russell v. Todd* 309 US 280); but for a full appreciation

of the argument of the majority below and for a realization of the extent to which decisions and dicta of this Court intermediate between 1842 and 1938 may still be deemed to be law in respect of the question here presented, it is necessary to analyze closely the 35 cases in this Court which have been referred to as illustrating the scope and nature of the Federal equity jurisdiction.

We begin with the theory advanced herein by the Second Circuit Court of Appeals.

A. Theory of the Court Below.

Of the 35 cases dealt with below, some 28 are referred to in the opinion of the Second Circuit Court of Appeals. That opinion proceeds on the theory that there exists a rule of "equitable 'remedial rights'" as to which Federal equity jurisdiction has been and continues (notwithstanding *Erie R. Co. v. Tompkins*) to be independent. The majority trace this doctrine back to "Chief Justice Marshall's opinion in *Robinson v. Campbell* 3 Wheat. 212",¹⁸ and say that from the date of that decision (1818) a Federal equity court exercising jurisdiction based on diversity of citizenship, was not obliged to apply State law "with respect to equitable 'remedial rights'". The majority hold that, while as to substantive rights the line of decisions based on *Swift v. Tyson* 16 Pet. 1 (1842) permitted the Federal courts in diversity cases to follow an independent line with reference to questions of "general law", this rule rested

¹⁸See R 89. Chief Justice Marshall did not write the opinion in *Robinson v. Campbell*, which was written by Todd, J. The majority below probably had in mind *U. S. v. Howland* in which Chief Justice Marshall did write the opinion and as to which see p. 31 below.

on an interpretation of the Rules of Decision Act, Judiciary Act of 1789 §34, 28 USC §725, and that the independence of the Federal equity jurisdiction with respect to "remedial rights" was and is an entirely separate matter. Therefore, so reasons the majority, the destruction of the rule of *Swift v. Tyson* by the decision in *Erie R. Co. v. Tompkins* (1938), left intact the separate rule as to the independence of equity courts as regards "equitable 'remedial rights'", more particularly as that doctrine rests on Judiciary Act §11, 28 USC §41 (1). The opinion below continues with the argument that "for the purposes of this doctrine [of equitable remedial rights]" State statutes of limitation are to be regarded in the Federal courts as affecting not substantive rights but these "equitable 'remedial rights' ". As authority for this conclusion the majority below cite *Kirby v. Lake Shore etc. R. Co.* 120 US 130 (Harlan J., 1887). As contravening the argument made below that the rationale of the *Kirby* case had been destroyed by *Erie R. Co. v. Tompkins*, the majority find support in this Court's decision in *Russell v. Todd* 309 US 280 (Stone J., 1940), pointing to the phrase "when consonant with equitable principles" in the Court's projection of the historical background (309 US at 288) and to a footnote at the bottom of page 288 (see R. 93, 143 F [2d] at 524). The majority also derive support for their analysis of the situation from the fact that Brandeis J. and Holmes J., who were known to have disapproved the doctrine of *Swift v. Tyson*, and the former of whom wrote the opinion in *Erie R. Co. v. Tompkins*, identified themselves with the opinions of this Court in three cases ante-dating 1938 (*Pusey & Jones v. Hanissen* 261 US 491; *Guffey v. Smith* 237 US 101; and *Benedict v.*

New York 250 US 321), which the majority below construe as supporting the doctrine of "equitable 'remedial rights'".

From their analysis of these and other decisions, the majority arrive at the conclusion (R 100, 143 F [2d] at 528):

"It follows that, while we are bound by the interpretation which New York decisions give to the trust indenture, we are not required to apply the New York statute of limitations if there are strong countervailing equitable considerations."

For the purposes of this conclusion the Court accepted *arguendo* our interpretation of the New York decisions as excluding such equitable considerations from the operation of the statute (R 88-9, 143 F [2d] at 521), the correctness of which interpretation has been demonstrated at pp. 7-16 of this brief:

B. Analysis of Authorities with respect to Federal Equity Jurisdiction.

In view of the importance of the phrase "equitable 'remedial rights'" used by the majority below to express the rationale of the decision, it is pertinent to seek the origin of the phrase. It seems to have been employed twice only; viz. in a sentence of Brandeis J. in *Pusey & Jones Co. v. Hansen* 261 US 491, 497, which Douglas J. quoted in *Kelleam v. Maryland-Casualty Co.* 312 US 377, 382, and in the opinion of Hughes C.J. in *Henrietta Mills v. Rutherford County* 281 US 121, 127. Each of the three opinions in which the term "remedial rights" appears uses it unmistakably to denote remedies, practice and procedure, Hughes C.J. referring in so many words to the distinction "clearly established between substantive and remedial rights". Other

employment of the phrase by this Court in any opinion we have not been able to find: The great stream of authority has dealt distinctly *either* with equitable remedies *or* with substantive rights in equity; and has, as appears to us, clearly discriminated between the two. Some cases decided before 1938, when a nicer discrimination in the employment of terms had not yet been rendered important by the rule of *Eric R. Co. v. Tompkins*, have employed the phrase or concept "Federal equity jurisdiction" in so broad a way as to give rise to the present confusion.

An analysis of the cases particularly with reference to the concept of equity jurisdiction involved in each, will show that they may be readily classified as between procedure and substance; that generally such part of the Federal equity jurisdiction as relates to practice in equity has been held independent of State decision and legislation; that the authorities upon which the decision below primarily rests offend against the rule of *Eric R. Co. v. Tompkins* and have been over-ruled; while a number of decisions even prior to 1938 have recognized the dependence of the Federal courts upon the substantive law of the States in matters lying outside the Constitution and acts of Congress.

The concept of Federal equity jurisdiction has been variously employed to mean (1) the right of the court to hear the case, (2) the manner of hearing in so far as it relates to procedure not decisive of the issue, or (3) matters determinative of the issue whether or not procedural in form.

1. *Federal equity jurisdiction conceived as the Court's right to hear the case.*

Some of the authorities which in this and other connections have been cited as supporting the exclusiveness of the

Federal equity jurisdiction with respect to other matters have dealt merely with the question whether a Federal court of chancery could exercise the rights given it by Congress under the Constitution. As expressed in the Judiciary Act of 1789 §11; 28 USC §41 (1), this grant of power was as follows:

"Original jurisdiction. The district courts shall have original jurisdiction as follows:

(1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and . . . is between citizens of different States . . .

Some cases cited on the general question of the extent or nature of Federal equity jurisdiction deal only with the application of the power thus conferred.

Payne v. Hook 7 Wall. 425, 429.

(1868: bill in a diversity case sustained notwithstanding existence of adequate remedy in Missouri court of probate)

Pennsylvania v. Williams 294 U. S. 176

(1935: jurisdiction with respect to receivership of a Pennsylvania corporation directed to be remitted to the State court; distinction between jurisdiction of a Federal court as such and the propriety of its action as a court of equity pointed out at p. 181)

Waterman v. Canal-Louisiana Bank 215 US 33

(1909: bill for relief with respect to property under administration in a State probate court where no attempt was made to set aside the probate or interfere with the possession; dicta at p. 43 with respect to historic basis of Federal equity jurisdiction and relative effect of State legislation establishing courts of probate).

Other cases referred to as illustrating Federal equity jurisdiction deal in reality with the division of the Federal jurisdiction between the equity and the law sides. Such are:

U. S. v. Howland 4 Wheat. 108

(1819: jurisdiction of the Circuit Court on a bill by the Government to collect taxes sustained; notwithstanding the availability of an adequate remedy at law in the State court by virtue of a state statute; dicta at p. 115 with reference to the uniformity of Federal chancery jurisdiction and powers).

In re Sawyer 124 US 200

(1888: Federal equity court held without jurisdiction to stay criminal proceedings brought by the mayor and council of Lincoln, Nebraska):

Matthews v. Rodgers 284 US 521

(1932: bill to enjoin as unconstitutional collection of a state tax with respect to which an adequate remedy existed in the

law of the State; statement at p. 529 with reference to the effect of State legislation on remedies in Federal courts of equity);

Stratton v. St. Louis Southwestern R. Co. 284 US 530

(1932: same question);

Di Giovanni v. Camden Fire Insurance Association 296 US 64

(1935: bill in equity to cancel insurance policies held not to lie where the State courts provided a remedy at law).

These and similar cases, while the opinions often contain general language, deal with equity jurisdiction either as a phase of the court's right to try the controversy between the parties or as a measure of the remedy available in equity as against the remedy available at law. As was stated in the *Di Giovanni* case at p. 69:

"It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. See *Henrietta Mills v. Rutherford County* 281 U. S. 121; *Smyth v. Ames*, 169 U. S. 466; *Risty v. Chicago, R. F. & P. Ry. Co.*, 270 U. S. 378. This follows from the nature of 'equity jurisdiction' of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity

is competent to give. See *Pennsylvania v. Williams*, 294 U. S. 176, 181, 182. If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford."

2. *Federal equity jurisdiction conceived as affecting the manner of hearing as to procedure only.*

The great bulk of the authorities which are cited as illustrating the independence of Federal courts of equity with respect to "remedial rights" are in reality limited to procedural matters not in themselves decisive of the issue. Such are:

Boyle v. Zacharie 6 Pet. 648

(1832: on motion to quash execution *held* that an injunction in equity does not operate as a supersedeas notwithstanding a statute of Maryland to that effect; statement by Story J. at p. 658 with respect to uniformity of practice in Federal equity, including dictum as to uniform "rules of decision");

Whitehead v. Shattuck 138 US 146

(1891: provision in Iowa Code with respect to quieting title to real estate *held* not to enlarge the Federal equity jurisdiction where plaintiff has an adequate remedy at law in Federal courts);

Scott v. Neely, 140 US 106

(1891: Federal equity court *held* not empowered to enforce claim of simple con-

tract creditor merely on basis of State statute since an adequate remedy at law exists in Federal courts);

Dodge v. Tulleys 144 US 451

(1892: on foreclosure of security for a loan held that attorney's fees in Federal equity cannot be limited by State law);

Cates v. Allen, 149 US 451

(1893: same holding).

Mississippi Mills v. Cohn 150 US 202

(1893: creditor's bill to reach property of debtor held not to be impaired by existence of remedy at law in the State courts; dicta at p. 205 with respect to independence of Federal equity jurisdiction as regards State statutes);

Pusey & Jones Co. v. Hanssen 261 US 491

(1923: form of receivership permitted by Delaware statute held inadmissible in Federal equity; discussion at pp. 497-9 of remedies concerning which the Federal courts have exclusive control as against rights which may be created by the States);

Henrietta Mills v. Rutherford County 281 US 121

(1930: State statute authorizing proceeding in the State court for an injunction held not applicable in Federal equity; statement at pp. 127-8 as to difference between rights

and remedies created by States with respect to enforcement in Federal courts);

Gordon v. Washington 295 US 30

(1935: receivership in Federal court of assets of Pennsylvania corporation *held* not properly created as an end in itself apart from ultimate relief available in Federal court; statement at pp. 36-7 with respect to distinction between jurisdiction of court as a Federal court and jurisdiction in equity);

Atlas Life Insurance Co. v. Southern, Inc. 306 US 563

(1939: certificate from Tenth Circuit Court of Appeals dismissed for inadequacy; statement at p. 568 as to difference between Federal jurisdiction and equity jurisdiction);

Sprague v. Ticonic National Bank 307 US 161

(1939: allowance of counsel fees and expenses *held* to lie within historic equity jurisdiction of Federal courts embracing the remedies, procedures and practice which had been evolved in the English Court of Chancery);

Kelleam v. Maryland Casualty Co. 312 US 377

(1941: receivership in Federal court with respect to matters involved in State probate court *held* improvident; statement at p. 382 that Federal remedies cannot be enlarged by State statutes).

Plainly, all these cases deal with remedies and with practice in the Federal equity jurisdiction, as distinguished from substantive rights therein. The decisions are based upon the Act of May 8 1792, 28 USC §723, providing in part:

"... the forms and modes of proceeding in suits of equity ... in the district courts shall be according to the principles, rules, and usages which belong to courts of equity ... except when it is otherwise provided by statute or by rules of court."

The real question in many of these cases is whether the matter under review constitutes a substantive right as to which State legislation or decision may control, or a part of the historic remedies and practices of equity. This distinction is nowhere better pointed out than in the opinion of Brandeis J. in *Pusey & Jones Co. v. Hanssen* 261 US 491, 497-9. He there uses the phrase "remedial right" to mean remedy as against substantive right, as does Hughes C.J. in the *Henrietta Mills* case (quoted at p. 42 below). But none of these decisions nor the others cited create thereby any confusion between rights and remedies. The words of Brandeis J. are taken into the opinion of Douglas J. in *Kelleam v. Maryland Casualty Co.* 312 US 377, 382. In the *Atlas* case this Court, after referring to Judiciary Act §11, 28 USC §41 (1), said (306 US at 568):

"The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne v. Hook*, 7 Wall. 425, 430; *In re*

Sawyer, 124 U. S. 200, 209-210; *Mattheyses v. Rodgers*, 284 U. S. 521, 525; *Gordon v. Washington*, 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity. See *Massachusetts State Grange v. Benton*, 272 U. S. 525, 528; *Pennsylvania v. Williams*, 294 U. S. 176, 181, and cases cited."

This statement related solely to the question as determining the propriety of exercise of Federal equity jurisdiction as against jurisdiction at law. Both from the context and from the authorities cited, it seems clear that the Court's reference to the jurisdictional statute as prescribing "the body of doctrine which is to guide their decisions" was directed to the *practice* in equity with reference to the availability of equitable relief on given facts, and was not intended to fix the *substantive content* of equity jurisdiction with respect to the kind and nature of the relief to be granted.

3. *Federal equity jurisdiction conceived as embracing matters determinative of the issue.*

The following cases, in so far as they refuse to apply State substantive law on the ground of the supposed independence of the Federal equity jurisdiction, have necessarily been overruled by *Erie R. Co. v. Tompkins*:

Robinson v. Campbell 3 Wheat. 212

(1818: Equitable defense under Tennessee law to an action of ejectment *held* unavailable, in part because the titles in question were derived from Virginia grants; dictum at pp. 222-3 relates to uniformity of remedies in the Federal courts according to the principles of common law and equity);

Livingston v. Story 9 Pet. 632, 655-7

(1835: on a bill to set aside a conveyance *held* that the failure of the State courts to recognize equitable claims or rights did not alter the equity jurisdiction of the Federal courts);

Clark v. Smith, 13 Pet. 195, 203

(1839: on a bill to compel release of a claim of title *held* that the Federal courts should enforce a State-created right, if consistent with the ordinary modes of proceeding in chancery);

Neves v. Scott 13 How. 268

(1851: on a question of construction of marriage articles executed in Georgia *held* that the court is not bound by relevant decision of the Supreme Court of Georgia; statement at p. 272 regarding uniform application of principles of equity under the judicial power);

Kirby v. Lake Shore etc. R. Co. 120 US 130

(1887: on a bill for an accounting including charge of fraud *held* that the Circuit Court had erred in following the construction placed by the New York courts on New York statute of limitations [CPA §48 subd. 5], but that on the Court's construction of the New York statute the plaintiff was barred in any event; dicta at pp. 136-8 as to the independence of Federal equity jurisdiction);

Kuhn v. Fairmont Coal Co. 215 US 349

(1910: in an action of trespass on land *held* that, even with reference to real estate, it is the right and duty of the Federal court to exercise an independent judgment where the law of the State had not been settled before the rights of the parties accrued);

Guffey v. Smith 237 US 101

(1915: on a bill for an injunction and accounting by holders of an Illinois oil lease *held* that the decisions of Illinois relative to the effect in equity of a surrender clause, would not be followed in the Federal court);

Benedict v. City of New York 250 US 321

(1919: in a suit to enforce an accounting against the city *held* that while Federal equity courts are not bound by State statutes of limitations they are ordinarily

guided by them and plaintiff was barred by a delay of 17 years);

In the following cases decided before *Eric R. Co. v. Tompkins*, this Court has treated the substantive law of the State of the forum as providing the rule of decision, even though the reason for such treatment was not generalized until the decision in the *Eric* case:

Brine v. Insurance Co. 96 U. S. 627

(1877: on an action of foreclosure in a Federal court for Illinois *held* that the right of redemption granted by State statute is controlling; statements at pp. 634-639 with reference to the difference between rights and remedies);

Missouri, Kansas & Texas Trust Company v. Krumseig, 172 U. S. 351

(1899: on a bill to cancel a usurious contract *held* that the local law consisting of State statutes as construed by State courts furnishes the rule of decision);

Dupree v. Mansur 214 U. S. 161

(1909: on a bill to quiet title to land in Texas *held* that the Texas statute of limitations with reference to barring of the right to foreclose should be applied in a Federal equity court);

Mason v. United States 260 US 545, 557

(1923: in suits by the United States to confirm title to land in Louisiana *held* that

while the "jurisdiction" of Federal equity courts is uniform throughout the United States, rights in equity may properly be the subject of State legislation).

4. *Summary with respect to Foregoing Decisions.*

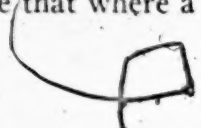
From a comparison of the decisions and dicta in the cases above cited, it is evident

(a) That this Court has consistently distinguished between rights and remedies in equity. One of the clearest statements is that in *Mason v. United States* 260 US at 557:

"Subject to certain exceptions, the statutes of a State are binding upon the Federal courts sitting within the State, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. [citations] That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the States. [citations] But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation."

Again in *Henrietta Mills v. Rutherford County* 281 US 121, in denying an injunction in the Federal court where an adequate remedy existed in the State court, Chief Justice Hughes pointed out the distinction (p. 127):

"The contention is that the state statute authorizing a proceeding in the state court for an injunction created an equitable right which should be enforced in the Federal court. It is true that where a



state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction."

After stating the rule that the enforcement in the Federal courts of new equitable rights created by the States must be subject to the restrictions imposed by Congress in the Judiciary Act of 1789, §16, 28 USC §384, the Court continued:

"Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, can not enlarge the right to proceed in a Federal court sitting in equity, and the Federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. *Pusey & Jones v. Hanssen, supra.*"

In 1839 the Court said in *Clark v. Smith* 13 Pet. at 203:

"The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the Courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the federal Courts, no reason exists why it should not be pursued in the same form as it is in the state Courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where

titles to lands are the subjects of investigation. And such is the constant course of the federal Courts."

And as late as 1939 this Court cited *Robinson v. Campbell*, *Boyle v. Zacharie* and *Payne v. Hook* for the proposition that the historic equity jurisdiction dating from the Judiciary Act of 1789 "constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, e.g., *Michaelson v. United States*, 266 U. S. 42;" *Sprague v. Ticonic Bank*, 307 US 161, 164.

The employment by Brandeis J. in *Pusey & Jones v. Haussen* of the term "remedial rights" and the quotation of his phrase by Douglas J. by *Kelleam v. Maryland Casualty Co.*, was not intended to and did not obliterate the distinction between rights and remedies. In both those cases this Court dealt with equitable remedies and distinguished them from substantive rights. This distinction is drawn in so many words by the use of the phrase in the *Henrietta Mills* case.

(b) That the question what lapse of time shall be deemed in Federal equity jurisdiction to be conclusive as against rights asserted in equity, has always been considered to be a substantive question. It is so treated by Harlan J. in the *Kirby* case and by Brandeis J. in the *Benedict* case; both of which said by way of dictum, that the Federal courts were independent of State decisions on the subject; and it is so treated by Holmes J. in *Dupree v. Mansur* (1909). In this case, which was a bill to acquire title to land in Texas, the Court held the Texas statute of limitations applicable to a cross-bill which sought to enforce a

vendor's lien, and also applied the construction put by the Texas courts upon the Texas statute in that connection. In response to the argument that the statute of limitations does not govern equitable proceedings and that the Federal equity jurisdiction is independent of State law, Holmes J. said with reference to the Texas substantive right involved (214 US at 167):

"But equitable or not it is a creation not of the United States, but of the local law of Texas. . . .

We should add as an independent consideration that it cannot be admitted for a moment that for a debtor to rely upon the statute of limitation is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right."

This holding strictly foreshadows the historic dissents of Holmes J. in *Kuhn v. Fairmont Coal Co.* 215 US at 370 (1910) and in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* 276 US 518, 532 (1928).

While the majority below seems to have understood by the phrase "remedial rights" a type of equitable relief which lay exclusively within the old chancery practice and was independent of State substantive law, we have already shown that in the three instances in which this Court has used the phrase it did not employ it in that sense, but in contra-distinction to substance or "substantive rights". Moreover it is not clear how the statute of limitations can be considered a "remedy" in any sense. The granting of "equitable relief" against the statute of limitations where

the law of the State of the forum would not grant it is, in diversity cases, a plain contravention of *Erie R. Co. v. Tompkins*.

(c) That even before 1938 a number of the decisions of this Court, as shown at pp. 40-1 above, recognized the dependence of the Federal equity jurisprudence upon State law. See particularly *Brine v. Insurance Co.* and *Missouri Kansas & Texas Trust Co. v. Krumseig* (p. 40 above).

(d) That in so far as the decisions of this Court prior to 1938 in dealing with matters determinative of the issue, i.e. with substantive questions, refused to follow State law upon the basis of the supposed independence of "Federal equity jurisdiction" in that respect, they have all now been overruled by *Erie R. Co. v. Tompkins*, 304 US 64, and *Ruhlin v. New York Life Insurance Co.*, 304 US 202.¹⁴

The now well-established doctrine of these cases has deprived of validity all the statements of law in the decisions of this Court anterior to 1938 asserting the independence of Federal courts of equity as regards the substantive law of the State of the forum. This is true whether the statements of law in question were necessary to the decision of the case or (as is the case for the most part)

¹⁴The subsequent decisions in this Court applying the rule of *Erie R. Co. v. Tompkins* in Federal equity are listed in footnote 42 of the opinion below, R. 96, 143 F (2d) at 525. See also *Huddleston v. Dwyer*, 322 US 232. *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 US 447, also discussed by the majority below in footnote 42 of the opinion, was not a diversity case, as particularly pointed out by this Court (pp. 455, 467).

were dicta unnecessary to the decision.¹⁵ This conclusion, obvious on its face, necessarily applies to the expressions in the old cases relied upon by the majority below, such as:

"... the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision..." (*U. S. v. Howland* 4 Wheat. 108, 115).

"The Chancery jurisdiction given by the Constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all." (*Boyle v. Zacharie* 6 Pet. 8, 658).

"By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat. §§913, 917; *Nevins v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430; *Dodge v. Tulleys*, 144 U. S. 451, 457; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204; (*Guffey v. Smith* 237 US 101, 114.)

The discussion of these cases in the opinion of the Court of Appeals errs in failing to distinguish between substantive rights and equitable remedies, citing *Pusey & Jones v. Hanssen* and *Kellean v. Maryland Casualty Com-*

¹⁵The language of the two cases prior to 1938 on which the majority below relied for its conclusions, viz. *Kirby v. Lake Shore etc. R. Co.* 120 US 130 and *Benedict v. City of New York* 250 US 321, was dictum only.

pany as if they dealt with substantive rights, and treating the phrase "remedial rights" as if it erected a new category of jurisprudence independent of both procedure and substance. Particular attention is called to the language of the Court below in distinguishing *Ruhlin v. New York Life Insurance Co.*, to the effect that "the opinion did not . . . discuss the question whether, the substantive rights being settled according to state decisions, the federal court should grant equitable relief of a kind other than that granted in the state court" (R. 95-6, 143 F. [2d] at 525). This conception of the Federal court's granting "equitable relief of a kind other than that granted in the State courts" refers clearly to substantive law. A Federal court of equity cannot grant relief of a kind other than that granted by the State courts, on the same facts, without re-establishing the dual legal system which existed before 1938. In *Erie R. Co. v. Tompkins* 304 U. S. 64, 78, this Court held that, except in matters governed by the Constitution or by act of Congress, the law to be applied in any case is the law of the State; and that *there is no constitutional warrant in a case based purely upon diversity of citizenship for the application of any other law.*

C. Kirby v. Lake Shore & Michigan Southern Railroad
120 U. S. 130 (1887).

The opinion of this Court was written by Harlan J., whose opinion in *Kuhn v. Fairmont Coal Co.* (1910) 215 U. S. 349, evoked the dissent of Holmes J. The action was brought in the Circuit Court for the Southern District of New York by the executor of the partner of a firm which had had transactions in the shipment of livestock with various railroads, and was for a decree to set aside settlements

of accounts between the firm and the railroads on the ground that they were based on fraudulent misstatements as to the applicable rates. Plaintiff sought an accounting and a decree for the difference. The agreement governing the transactions took effect June 10 1870 and was to continue in force for a year. The plaintiff claimed that the frauds were not and could not have been discovered until April 16 1873, and the suit was brought April 9 1880. The New York Code of Civil Procedure then in force contained a provision similar to the present Civil Practice Act §48, subd. 5, to the effect that a cause of action to procure a judgment on the ground of fraud is not deemed to have accrued until discovery of the facts.

The only difference between the Circuit Court and the Supreme Court was that the Circuit Court in applying the statute conceded itself to be bound by the construction thereof by the New York Court of Appeals in *Carr v. Thompson*, 87 N. Y. 160; whereas this Court acknowledged no such restriction. In the first place Harlan J. suggested that the New York Court of Appeals itself might not apply *Carr v. Thompson* to the facts involved in the *Kirby* case.

In the second place the Court went on to say, purely by way of dictum, that relief on the ground of actual fraud, especially if concealed, is a separate head of equity jurisdiction as to which the Federal courts are independent of State law. At p. 137 Harlan J. said:

"While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the

local statutes of the different states in which they sit."

After quoting *United States v. Howland* 4 Wheat. 108 and *Payne v. Hook* 7 Wall. 425, and citing other cases which have been discussed above, Harlan J. continued (p. 138):

"In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. *Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state.* It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that *the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.* It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud." (Italics supplied.)

The foregoing language, which expresses the rationale of the Circuit Court's decision herein, was dictum because

Harlan J. concluded by holding that in any event more than six years had elapsed since the admitted discovery of the facts, and that this delay barred the action. Apparently the Court did not even inquire whether plaintiff was guilty of "gross laches" (120 US at 139) but simply applied the New York statute of limitations.

In *Benedict v. City of New York* 250 US 321 where this Court applied the doctrine of laches on the ground of the lapse of 17 years between repudiation of the trust and commencement of suit, Brandeis J. likewise said by way of dictum, citing the *Kirby* case, that Federal courts sitting in equity are not bound by State statutes of limitation (p. 327).

If these passages from the *Kirby* and *Benedict* cases on which the decision below was founded were still law, it might be possible to say that they were in no way necessary to the decision in the case and this Court is not bound by them (cf. footnote 48a of the opinion below; R. 99; 143 F[2d] at 527). In fact, however, the mere perusal of the passages quoted shows that they have not survived *Erie R. Co. v. Tompkins* and are no longer law; they partake of that very concept of a uniform and independent Federal equity jurisprudence which, for diversity cases, the *Erie* and *Ruhlin* doctrine has destroyed.¹⁶

D. *Russell v. Todd* 309 U. S. 280 (1940).

The Court of Appeals supported its interpretation of the *Kirby* case by this Court's decision in *Russell v. Todd*,

¹⁶The *Kirby* case has not since a date before *Erie R. Co. v. Tompkins* been cited either by this Court or by any Circuit Court of Appeals with two exceptions only, viz. in *Russell v. Todd* and in the opinion of the Circuit Court of Appeals herein.

which the Court below thought cited the *Kirby* case "with approval" (R. 98, 143 F[2d] at 526).¹⁷ *Russell v. Todd* was an action in equity under the Federal Farm Loan Act to enforce against stockholders of a joint stock land bank a remedy by assessment which this Court held to be exclusively equitable (p. 286). The Second Circuit Court of Appeals, also holding the action to be exclusively equitable, had applied the doctrine of laches and refused application of the New York three-year statute of limitations, Civil Practice Act §49. The action was brought more than three and less than four years after the cause of action accrued. The essential holding of this Court was that it did not appear with reasonable certainty that the three-year statute would be applied by the State courts to like causes of action; that the ten-year statute did apply; and that the Court below rightly gave judgment for the plaintiffs upon finding that the cause of action was not barred by laches (pp. 293-4). Since laches had not been found to be a defense and the Court had not declined to give effect to a State statute shown to be applicable, this Court concluded that under the circumstances it had (p. 294)

"no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equi-

¹⁷The original theory of the Court below was that the statement in *Russell v. Todd* "The Rules of Decision Act does not apply to suits in equity" made the doctrine of *Eric R. Co. v. Tompkins* inapplicable to questions of limitations in equity (R. 53). In the revised opinion, however, the Court below acknowledged that the sentence quoted did not have the significance supposed, since the Rules of Decision Act has been held to be merely declaratory of the pre-existing rule in equity as well as at law (R. 90, 143 F. [2d] at 522, citing *Mason v. United States*, 260 U. S. 545, 559).

table remedies, are bound to follow state statutes and decisions affecting those remedies."

How then did the Court below come to consider *Russell v. Todd* as authority for its view? From the opinion (R. 93-4) it would seem that the Court below took this Court's discussion of the historical background as being an announcement of present-day legal principles. The passage on which the Circuit Court primarily relied was clearly marked as a review of the authorities. It introduced the English cases and early cases in this Court with phrases like the following (pp. 287-8):

"From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations... and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits

In federal courts of equity the doctrine of laches was early supplemented by the rule that...

Particular importance is given by the Court below to the footnote at p. 288 of this Court's opinion, which footnote also relates to the historical review of the cases and which cites the *Kirby* case.

On the other hand the Court below ignored the following statement at p. 289, in connection with which the *Kirby* case was also cited:

"But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling [citations]" (Italics ours);

and the following statement at p. 290:

"The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, *unless it is applied to like causes of action in the state courts*" (Italics ours);

and the following statement at p. 293:

"We take it that in the absence of a controlling act of Congress *federal courts of equity*, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, *adopt and apply local statutes of limitations* which are applied to like causes of action by the state courts. Cf. *Mason v. United States*, 260 US 545; *Jackson County v. United States*, 308 US 343" (Italics ours).

These three sentences from the opinion of this Court seem to us not only much more important as an expression of opinion than the text of the footnote summarizing some pre-1938 cases, but also a reasonably clear indication that the statute of limitations of the forum must be applied in equity in a diversity case where it is shown with reasonable certainty that the statute would be applied by the State court in a like case. We find it extraordinary that the majority below does not discuss these sentences, much less give any effect to them—a fact made more striking because the same Court previously applied the New York six-year statute of limitations to an action claimed by plaintiffs to be of equitable cognizance, with the statement:

"As *Russell v. Todd* shows, the court was ready to accept an explicit applicable state statute to a suit of exclusively equitable cognizance, and further held that a suit even of an equitable nature brought in aid of a legal right follows the state statute of limitations as to such right . . ."

Shultz v. Manufacturers & Traders Trust Co., 128 F. (2d) 889. This Court denied certiorari, 317 U.S. 674.

Other Circuit Courts of Appeals which have applied the State statute of limitations in equity cases, sometimes with citation of *Russell v. Todd*, are:

Roos v. Texas Co. 126 F. (2d) 767, 768 (C.C.A. 5, 1942);

Isaacks v. Jeffers 144 F. (2d) 26, 28 (C.C.A. 10, 1944);

Sanders v. Louisville & N. R. Co. 144 F. (2d) 485, 486 (C.C.A. 6, 1944);

Schram v. Poole 97 F. (2d) 566, 572 (C.C.A. 9, 1938);

Ganchoff v. Home Owners Loan Corporation 52 F. Supp. 349, 350, aff'd 142 F. (2d) 677 (C.C.A. 7, 1944);

Dixie Margarine Co. v. Schaefer 139 F. (2d) 221, 224 (C.C.A. 6, 1943).

Thus six circuits have approved or have acted on the interpretation of *Russell v. Todd* here contended for.¹² In *Hochstetler v. Crezes* 144 F. (2d) 665 (C.C.A. 10, 1944) the

¹²Respondent's previous discussion of the cases in the Circuit Courts of Appeals has missed the point. Of the cases cited by her in the brief in opposition to certiorari (pp. 19-20) only *Robinson v. Linfield College* dealt with the statute of limitations, and, some were not even diversity cases.

Court applied the doctrine of laches, but noted that the Oklahoma decisions were in accord. In *Robinson v. Linfield College* 136 F. (2d) 805 (C.C.A. 9, 1943) the Court indicated doubt as to the effect of *Russell v. Todd* but held the action to be barred. In *Borserine v. Maryland Casualty Co.* 112 F. (2d) 409, 416 (C.C.A. 8, 1940) the Court said that Federal courts sitting in equity are not bound by State statutes of limitations, but the suit was brought within the time permitted by the Missouri statute and *Russell v. Todd* is not mentioned. In *Committee for Holders of Central States Electric Corporation, etc. v. Kent* 143 F. (2d) 684 (C.C.A. 4, 1944), the Court intimated doubt whether statutes of limitation would be followed in a Federal court of equity, but did not discuss the question.

Conclusion

The New York statute of limitations as it would be applied to like cases by the State courts, is a complete defense to the action, and the Court below has erred in not applying it.

The order and judgment of the Second Circuit Court of Appeals should be reversed and the judgment of dismissal in the District Court affirmed on the ground of the New York statute of limitations.

Respectfully submitted,

JOHN W. DAVIS,
Attorney for Petitioner

THEODORE KIENDL,
RALPH M. CARSON,
FRANCIS W. PHILLIPS,
Of Counsel

FILE COPY

JAN 15 1945

IN THE
Supreme Court of the United States

OCTOBER TERM 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

against

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

JOHN W. DAVIS,

Attorney for Petitioner

THEODORE KIENDL,

RALPH M. CARSON,

FRANCIS W. PHILLIPS,

Of Counsel

January 10, 1945.

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IN THE
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OCTOBER TERM 1944

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

against

GRACE W. YORK,

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No. 264

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
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PETITIONER'S REPLY BRIEF

Within the week before the oral argument we received not only respondent's brief but briefs by two friends of the Court, viz. the Securities & Exchange Commission and the trustees of Central States Electric Corporation.

A. Respondent's Brief.

(1) At p. 3 respondent makes the expected misapplication (our main brief p. 15) of *Heller v. Boylan* and *Turner v. American Metal Co.* *Potter v. Walker* 276 NY 15 decided only that in a derivative action the plaintiff stockholder is barred by the same statute of limitations as would govern the same action if brought by the corporation, namely six years in case of claims cognizable at law and ten years in case of claims cognizable only in equity.

At p. 4, respondent's contention with regard to the application of Civil Practice Act §23 overlooks the determinative fact of the difference of theory between the *Hackner* case in which York sought to join, and the present action. The *Hackner* case was based on allegations of fraud or common law deceit, while the theory of the present action is breach of trust. We have already called attention to this point. (footnote 2 on p. 4 of our main brief). See also *Harriss v. Tams* 258 NY 229; *McConnell v. Caribbean Petroleum Co.* 278 NY 189, 193; *Goldstein v. Tri-Continental Corporation* 282 NY 21.

(2) Although respondent does not discuss the point, the question as between application of the six-year statute and application of the ten-year statute turns upon whether the remedy in equity was here concurrent with that at law. This question under the New York decisions is discussed at pp. 10-15 of our main brief. The present case is clearly one of concurrent jurisdiction within the meaning of that term as applied by the New York courts in connection with limitations; in fact, the present case is described as one of concurrent jurisdiction by the Third Circuit Court of Appeals in *Overfield v. Pennroad Corporation* (December 28 1944, not yet officially reported) in footnote 1 of the opinion at p. 4. The majority below intimates that the jurisdiction of equity herein may be exclusive rather than concurrent (R 97, 143 F [2d] at 526), but also says that the determination of that question is of no moment (R 98, 143 F [2d] at 526).

The Court below also says that the determination whether the jurisdiction of equity herein is exclusive or concurrent must be made on the basis of the Federal and

not the New York decisions (R 97, 143 F [2d] at 526). It may be assumed that in some sense this is so; see *Di Giovanni v. Camden Fire Insurance Association* 296 US 64 and other cases cited at pp. 30-2 of our main brief. The Federal decisions show that the present case is clearly one of concurrent jurisdiction requiring application of the statute of limitations as at law. See *Curtis v. Connely* 257 US 260; *McNair v. Burt* 68 F (2d) 814 (CCA 5 1934). *Russell v. Todd* 309 US at 289 cites thirteen cases in this Court which considered the point prior to 1938 in connection with the question whether to apply the doctrine of laches as against the State statute of limitations; and the analysis of those cases set forth in the appendix at pp. 27-30 below shows clearly that the present is a case of concurrent jurisdiction within the meaning of the Federal precedents.

It is obvious, however, that if the State statute of limitations falls within the ambit of the *Erie* and the *Ruhlin* doctrine, the question of the existence of concurrent remedies must be determined by the Federal courts in diversity cases in the same manner as the State courts determine it in applying their statutes of limitation. Not to do so would, as was remarked from the bench, only beg the question; for it would result in the defense of limitations conferring lesser or different benefits in the Federal than in the State courts. For example, if the New York decisions would treat an action like the present action as one of concurrent remedies (*Keys v. Leopold*, 241 NY 189) and thus apply the six-year statute of limitations, while the District Court for the Southern District of New York exercising an independent choice in that regard were to treat the case as one of exclusively equitable cognizance and thus apply the ten-year statute (as was done in *Russell v. Todd* with regard to a

remedy under the Federal Farm Loan Act), the result would be that a Pennsylvania noteholder suing the trustee for damages for breach of trust would have greater rights than a New York noteholder making the identical claim under the identical instrument. This is the "inadmissible" situation which *Erie R. Co. v. Tompkins* was intended to cure.

(3) At p. 5 respondent erroneously argues that *Cox v. Stokes* 156 NY 491 and *Treadwell v. Clark* 190 NY 58 (called *Treadville v. Clarke* by respondent) injected some doubt into the question of the survival of laches as distinct from limitations. A reading of these cases will show that our statement of the rule (main brief p. 10) is accurate. In other words, the consideration by the Court of the doctrine of laches and the intimation of doubt with regard to its survival in New York, related to laches only as a ground for the barring of discretionary relief *within the statutory period of limitation* (156 NY at 511; 190 NY at 60¹).

Respondent is also incorrect in saying (br. p. 5) that the doctrine of laches was applied to lengthen the period of limitations and remove the bar of the statute in *Dodds v. McColgan* 229 AD 273. That opinion will be searched in vain for any reference to laches. It stands only for the proposition that where a remarkable series of intentional misrepresentations by defendant had subjected the plaintiff to the bar of limitations at law, equity may enjoin the defendant from availing of limitations. While so much is said by the Appellate Division by way of dictum, the ac-

¹Gray J. said in the *Treadwell* case: "If the Statute of Limitations has not barred the suit, mere delay should not be held to bar it, unless unreasonable."

tual holding is that the case was governed by Civil Practice Act §53 providing a limitation of ten years which had not yet expired. The Court said that plaintiff could also recover under the statute of limitations applicable to actual fraud (CPA §48 subd. 5, as extended in the particular circumstances by the special provision for case of death, §21). *Clark v. Gilmore* 149 AD 445 is a similar case in that an extraordinary chain of misrepresentations was held to justify the assumption of jurisdiction by equity with resultant application of the ten-year statute of limitations (CPA §53). There is in neither of these cases any intimation of the proposition for which the respondent York cites them, to the effect that in New York the doctrine of laches may under appropriate circumstances *supersede* the statute of limitations. Neither case went to the highest court of the State. It is obvious from the facts of each case that the six-year statute of limitations applicable to actual fraud, §48 subd. 5, was applicable; and it is this statute which under similar circumstances the Court of Appeals held to govern in *Lightfoot v. Davis* 198 NY 261.

(4) On the oral argument respondent's counsel endeavored to raise some question as to the manner in which the defense of limitations was asserted by petitioner on the motion for summary judgment. This motion having been made before answer, it of course did not permit the filing of a formal plea of limitations (see our main brief p. 5). The point perhaps resolves itself merely into a question whether respondent received notice below concerning the defense of limitation, a question which would seem to be conclusively answered by the presentation of the defense in the brief in the District Court as well as in the Circuit Court of Appeals, and also by counsel's concession on the

oral argument that he anticipated the defense of limitations and drew his complaint to meet it (see R 11). The defense of limitations was not indeed set up in the *affidavit* which defendant filed in the District Court, but it is plainly indicated in the first paragraph of the stipulation on which the motion for summary judgment was made (R 16). In the *Eastman* case, in which York's counsel was also counsel, the District Court intimated without deciding that the six-year statute of limitations would bar the action, 43 F Supp 637, 643, affirmed 130 F (2d) 300, certiorari denied 317 US 691, rehearing denied 317 US 713.

(5) Respondent's argument as to the non-substantive character of the New York statute of limitations (br. pp. 6-11) deals with the proposition more fully dealt with in the brief of the Central States trustees; and we answer it at pp. 14-18 below. *Exploration Company Ltd. v. U. S.* 247 US 435, from which respondent quotes in this connection, involved a period of limitations provided in a Federal statute and also involved actual fraud—both points of distinction which make it irrelevant to the present question. *Bailey v. Glover* 21 Wall. 342 (referred to by respondent, br. pp. 5, 7, and discussed at p. 15) involved the two-year statute of limitations in the Bankrupt Act of 1867; the bill alleged a conspiracy between the bankrupt and members of his family to defraud the only creditor of the estate. The opinion of Miller J. points out the factor which deprives the case of any relevance to the present question (p. 349):

"While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing this statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that . . ." etc.

(6) Respondent's argument (br. pp. 12-16) concerning the doctrine of "remedial rights" has been fully anticipated in the portion of our main brief discussing the point (pp. 25-55).²

On the oral argument respondent referred also to the recent decisions of this Court in *Douglas v. Jeannette* 319 US 157, 163; *Great Lakes Dredge & Dock Co. v. Huffman* 319 US 293, 297; and *Hazel-Atlas Co. v. Hartford-Empire Co.* 322 US 238. Of these only the first involved jurisdiction based on diversity of citizenship. None involved a State statute of limitations. The *Douglas* case and the *Great Lakes Dredge & Dock Co.* case both fall within the group of decisions which in reality deal only with the division of the Federal jurisdiction between the equity and the law sides, as illustrated at pp. 31-2 of our main brief; that is, the Court was concerned primarily with the propriety of the exercise of equity powers, whether by reason of the nature of the facts presented or by reason of the resultant interference with the domestic policy of the States. *Alexander v. Hillman* 296 US 222 (which antedates *Erie R. Co. v. Tompkins*) was also referred to by respondent on oral argument, presumably with reference to the language at p. 239 as to the jurisdiction of courts of equity over

²Respondent is correct in pointing out (br. p. 27) that *Kirby v. Lake Shore etc. R. Co.* 120 US 130 has recently been cited in *Fraser v. US* 145 F (2d) 139, 144 (CCA 6 1944), a decision which appeared in the December 11 1944 *Advance Sheets* and has not yet been noted in *Shepard*. Since our main brief was filed, the *Kirby* case has also been cited by this Court in *Coffman v. Breeze Corporations Inc.* (No. 71 January 2 1945) 13 Law Week 4092, 4093. Both these cases arose under an act of Congress and it does not appear that the application made by either Court of the *Kirby* case has any bearing on equity jurisdiction in diversity suits.

trusts. This was a diversity suit in equity, and did not involve the statute of limitations. General language in the opinion as to the nature of the Federal equity jurisdiction is, of course, controlled by the doctrine of *Ruhlin v. New York Life Insurance Co.* 304 US 202 and subsequent cases.

At pp. 16-20 and at pp. 27-8 respondent makes the remarkable contention that all the Circuit Courts of Appeal have now decided that a Federal equity court exercising jurisdiction based on diversity of citizenship, is not bound by the statute of limitations of the State of the forum. Examination of the authorities cited will show the falsity of any such contention and the extent of respondent's misapprehensions concerning the problem presented on this appeal. Of the cases cited by respondent, seven antedate *Erie R. Co. v. Tompkins*; three also are not based on diversity jurisdiction; and eight furthermore do not involve the statute of limitations at all. At pp. 54-5 of our main brief we have referred to the only recent authorities in the Circuit Courts of Appeal (except the *Fraser* case) cited by respondent which have any possible application to the question of limitations in Federal equity courts exercising the diversity jurisdiction. *Fraser v. U. S.* 145 F (2d) 139 (CCA 6 1944) arose under the Agricultural Adjustment Act of 1938 as amended, 7 USC §§1348, 1330, 1340. The reference to the *York* and *Kirby* cases at p. 144, for which respondent cites this opinion, is far from constituting an unqualified approval of the result reached by the Court of Appeals herein³.

At p. 54 of our main brief we called attention to decisions of the Circuit Courts of Appeal in five circuits, in

³P. 144: "If, however, the rationalization in the *York* case supra, supported as it is by copious annotation, is sound, and the rule of the *Kirby* case prevails, notwithstanding *Erie R. Co. v. Tompkins* . . . we must conclude . . . etc."

addition to a prior decision of the Second Circuit Court of Appeals (*Shultz v. Manufacturers & Traders Trust Co.*, 128 F.2d 889, cert. den. 317 US 674), all of which have approved or acted on the theory that Federal equity courts in diversity cases must follow State statutes of limitation held to be applicable to like cases by the State courts. We now add to this list the opinion of the Third Circuit Court of Appeals (not yet officially reported) in *Overfield v. Pennroad Corporation*, decided December 28 1944 (Biggs Cir. J. dissenting). The majority of the Court there applied the Pennsylvania six-year statute of limitations to a derivative action based on diversity of citizenship. Goodrich Cir. J. states the doctrine of *Russell v. Todd* as follows (pp. 3-4 of the printed opinion):

"The first problem is the orientation of this case into the law applicable in federal courts. Federal jurisdiction is invoked solely on account of diversity of citizenship; there is no independent federal question involved in the plaintiffs' claims. If all the operative facts had occurred in Pennsylvania and the actions were of a type formerly cognizable on the law side of the federal court there is no doubt that the Pennsylvania statute of limitations would control as to their timeliness. The same is true where, upon local facts, an action formerly cognizable in equity, is brought in federal court and the local statute is applicable to local suits in equity. Where the suit is brought in equity and is not in aid or support of a legal right, the jurisdiction on the equity side is said to be 'exclusive' and the limitation period applicable is determined by the doctrine of laches as applied in federal courts, assuming that there is no local statute applicable to suits in equity. Where, however, the jurisdiction of equity

is 'concurrent' with that at law or the suit is brought in aid of a legal right, the state statute of limitations applicable to legal remedies and rights will be applied in the equity suit. With these propositions which have been recently enunciated by the Supreme Court in *Russell v. Todd*, 309 U. S. 280 (1940), before us, their application to the present litigation will be discussed."

This opinion also contains an acute analysis of the doctrine of concurrent remedies in the law of Pennsylvania, which is the same as the doctrine in New York. (pp. 8-9; 10-11):

"What was claimed here was the failure of the directors of the Pennroad corporation to do their duty as such directors and the participation in their breach of duty by the corporate defendant, the Pennsylvania Railroad, whom they also served. For this claim an action at law could have been brought had the appropriate officers of Pennroad, through corporate action, desired to bring it. The fact that an accounting was asked for in addition to money damages would not have changed the action at law to one cognizable exclusively in equity. Equity jurisdiction, where an accounting is sought from one who has breached a fiduciary duty, such as that owed by a corporate director, is concurrent with that at law. The shareholder gets into the litigation only by a derivative suit. The right being enforced is that of the corporation of which he is a member.

* * *

But the fact that the shareholder gets into the litigation through a bill in equity does not change the fact that the right to be enforced is the legal right of the corporation. We have then a situation where equity is resorted to merely as a means of enforce-

ing a legal claim. The description usually given is that this is a situation where the jurisdiction of equity is concurrent. The jurisdiction is concurrent, although equity is resorted to as a means of putting the machinery in motion and although, also, the relief given by an equity court may in a given case be more complete and satisfactory than that afforded through a judgment at law."⁴

The concurring opinion of Jones Cir. J. citing the *Ruhlin* case, applies the doctrine of that decision to the question of limitations in diversity actions in a manner which seems to us unanswerable (pp. 21-2 of the opinion):

"It seems plain (and I do not understand the dissent to dispute) that a Pennsylvania court would be under the duty of applying that State's statutes of limitation, when interposed, to suits for causes such as are pleaded in the instant cases. That is so whether the suits be brought on the court's law or equity side, the jurisdiction of equity for the purpose being concurrent. See cases cited in majority opinion. A federal court, bound to follow the law of the State, could hardly do otherwise. If a cause of action becomes cognizable in a federal court sitting in Pennsylvania, because it would be likewise cognizable in a court of that State, but the federal suit is to be relieved of the impediments which a Pennsylvania court would be bound to enforce, if pleaded, then a right under Pennsylvania law will be accorded to federal court litigants in that State which they would not enjoy in a court of the State. Such a re-

⁴In support of the statement that the authorities generally apply the statute of limitations at law in equitable cases of concurrent jurisdiction, Judge Goodrich marshals the precedents in footnote 14 of the opinion and states the New York law as it is stated in our main brief.

sult, if effected, would constitute an unwarranted impairment of the rule of *Erie Railroad Co. v. Tompkins*.

Wherein then is the escape from the barrier of the pleaded limitations? It is suggested that it lies in the fact that the instant suits are in equity in a federal court. But, as already noted, the rule of *Erie Railroad Co. v. Tompkins* extends to suits in equity in federal courts when their jurisdiction depends upon diversity of citizenship. *Ruhlin v. New York Life Insurance Co.*, supra.¹

The following pointed observation by Judge Jones is a complete description of the charge of "fraud" upon which respondent here relies (p. 22 of the opinion):

"There is hardly a definable limit to what an outraged imagination, sprung from a chastened hindsight, may not later suggest as having been appropriate matter for prior disclosure."

B. Brief of *Amicus* Securities & Exchange Commission.

This brief, while acknowledging that the present controversy is between private parties and does not involve any statute administered by the Commission, nevertheless urges that this Court should not impose upon Federal equity courts in diversity actions the obligation to follow applicable State statutes of limitation, on the remarkable

¹It is fair to say that both the majority opinions, while referring to the decision of the Second Circuit Court of Appeals herein and appearing to recognize that it is contrary to the result reached in the *Overfield* case, do not explicitly disapprove it but distinguish it (opinion pp. 4, 22); while the minority treats the opinion below in this case as authority for refusing to apply the Pennsylvania statute of limitations (p. 68).

ground that the effect will be to make the Federal courts instruments of State policy in matters where the Commission may be subsequently charged with executing a national policy. This is an extraordinary type of argument to address to a Court engaged in applying the law to a controversy involving private rights, and we need hardly say is not supported by any citation of authority. Nor is it to be supposed that the existence or non-existence of a general rule of decision is to be determined by its possible application to supposititious cases. In stating that the question here tendered does not involve a matter of substantive law and that the Commission does not understand our contention to be to the contrary (br. pp. 14-5), this amicus shows complete misapprehension of our argument.

C. Brief of Amici Trustees of Central States Electric Corporation.

This brief is the only one which attempts to present at all systematically an argument in support of the "remedial rights" theory developed by the Second Circuit Court of Appeals in this case.

(1) Pages 3-18 of this brief present the argument based upon the concept of "Federal equity jurisdiction" which has been fully anticipated in our main brief. We do not see, nor do these amici explain, how the concept of a Federal equity "jurisdiction" independent of the laws of the States in the manner contended for by the amici, can be consistent with the doctrine of *Erie R. Co. v. Tompkins*. One of the difficulties of the authors of this brief is that they do not realize how fully the doctrine of *Erie R. Co. v.*

Tompkins extends to diversity suits in equity. *Ruhlin v. New York Life Insurance Co.* 304 US 202 has since been followed in this Court by *Huddleston v. Dwyer* 322 US 232 and by the eleven other cases listed in footnote 42 of the opinion below (R 96, 143 F [2d] at 525). This established principle is touched by these amici only in the form of a grudging concession 'arguendo' (br. pp. 19, 44), and they actually treat *Russell v. Todd* 309 US 280 as involving a "contrary assertion" (pp. 19-20, 44).

What the authors of all the briefs on respondent's side fail to realize is that the thinking of *Swift v. Tyson* colored the language of decisions in this Court far beyond the limited proposition for which the case might be thought to stand. Compare *Vandenbark v. Owens-Illinois Co.* 311 US 538, 540, where this Court said:

"During the period when *Swift v. Tyson* (1842-1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law."

(2) Much effort and ingenuity are expended by these amici (br. pp. 19-35) in analyzing the New York statute of limitations to show from different points of view that it has always been regarded as dealing with the remedy only, from which the inference is drawn that it cannot fall within the area of substantive law in which Federal courts must follow the States.

That the New York statute of limitations, like such statutes generally, takes away the remedy without destroying the right is readily conceded (our main brief p. 16),

but the inference sought to be drawn from this fact is a *non sequitur*. When *Eric R. Co. v. Tompkins* was decided, this Court pointed out that the line between procedural and substantive law is hazy (304 US at 92). The mere fact that the statute of limitations operates upon the remedy is not, given the decisive nature of the defense, an indication that it appertains to procedure rather than to substantive law within the intent of the *Eric* doctrine. Chamberlayn, *The Modern Law of Evidence* (1911), §170, says:

Statute of Limitations.—The limitation on the right to bring an action—a specimen of procedural law—is practically equivalent to the loss or prescription of the right itself by lapse of time. Severing the ligature between right and remedy as in the procedural limitation of actions deals a deathblow to the right itself. It may be said that the removal of the remedy leaves an imperfect right, into which waiver or other act of the other party may instill legal vitality, while in the latter case the right is entirely gone. But the distinction seems metaphysical rather than practically valuable. It in no way affects the truth of the statement that the difference between substantive and procedural law is largely one in form of statement.

Thus the fact that the statute of limitations affects the remedy only has in no way impaired its treatment by this Court as furnishing a “rule of decision” governing actions at law even before the Conformity Act (1872), 28 USC §724, 17 Stat. 197. This fact is recognized in a decision from which the amici quote (br. p. 39), *Michigan Insurance Bank v. Eldred* 130 US 693, 696. The Court there said:

"But it had been settled by a series of decisions of this court that *statutes of limitations, even in personal actions*, including actions on judgments, were 'laws of the several States' which, except where the constitution, treaties or statutes of the United States otherwise required or provided, *must, under the Judiciary Act of September 24, 1789, c. 20, §34, be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.*' [citations] *Statutes of limitation of personal actions are laws affecting remedies only, and not rights*, as is clearly shown by the decisions that the only statutes of limitations applicable to such an action are the statutes of the State where the action is brought, and not those of the State where the cause of action arose. [citations] It was thus established that statutes of limitations of the State governed personal actions in the courts of the United States." (italics supplied)

Since the decision in the *Erie* case the analogous question of the proper rule governing burden of proof has been decided by the First Circuit Court of Appeals in *Sampson v. Channell* 110 F (2d) 754, cert. den. 310 US 650. This was a diversity suit in a Federal court for Massachusetts for a personal injury inflicted in Maine. The question was whether the Court properly charged the jury as to burden of proof in accordance with the law of Maine, or whether it should have adopted the Massachusetts rule that the burden of proof with respect to contributory negligence is on the defendant. The Massachusetts court interpreted their own rule as one of procedure. In holding that it was nevertheless a substantive law question within the intent of the *Erie* rule, Magruder Cir. J. said (pp. 754, 756, 762):

"It would be an over-simplification to say that the case turns on whether burden of proof is a matter of substance or procedure. These are not clean-cut categories. . . .

It is apparent, then, that burden of proof does not fall within either category of 'substance' or 'procedure' by virtue of any intrinsic compulsion, but the matter has been made to turn upon the purpose at hand to be served by the classification. Therefore, inasmuch as the older decisions in the federal courts, applying in diversity cases the federal rule as to burden of proof as a matter of 'general law', are founded upon an assumption no longer valid since *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, their classification of burden of proof as a matter of substance should be re-examined in the light of the objective and policy disclosed in the Tompkins case.

The opinion in that case sets forth as a moving consideration of policy that it is unfair and unseemly to have the outcome of litigation substantially affected by the fortuitous existence of diversity of citizenship. . . .

This result may seem to present a surface incongruity, viz., the deference owing to the substantive law of Massachusetts as pronounced by its courts requires the federal court in that state to apply a Massachusetts rule as to burden of proof which the highest state court insists is procedural only. The explanation is that reasons of policy, set forth in the Tompkins case, make it desirable for the federal court in diversity of citizenship cases to apply the state rule, because the incidence of burden of proof is likely to have a decisive influence on the outcome of litigation; and this is true regardless of

whether the state court characterizes the rule as one of procedure or substantive law."

This decision has been cited several times since by this Court, and was cited on this point in *Palmer v. Hoffman*, 318 US 109, 117. See also *Cooper v. Brown*, 126 F (2d) 874 (CCA 3 1942: rule as to admissibility of proof of contents of a missing document held to be substantive); *Fort Dodge Hotel Co. v. Bartelt*, 119 F (2d) 253, 258 (CCA 8 1941); *Coca Cola Bottling Co. v. Munn*, 99 F (2d) 190 (CCA 4 1938) and *Hagan & Co. v. Washington Water Power Co.* 99 F (2d) 614 (CCA 9 1938) (rule of *res ipsa loquitur*)⁶.

It is manifest that the statute of limitations is more nearly final and conclusive of rights in litigation than any of the apparently procedural matters which this Court or the Circuit Court of Appeals have held to fall within the *Erie* doctrine. See *McCrory v. Harp*, 31 F Supp 354, 358 (D. C. La. 1940); and cf. *Dunbar v. Boston & P. R. Corp.*, 181 Mass 383 (Holmes J.).

(3) At pp. 35-45, these amici endeavor to show that even since the decision in *Erie R. Co. v. Tompkins*, this Court has held that the Federal equity jurisdiction is not subject to impairment by State law. This argument is constructed upon a misunderstanding of the Rules of Decision

⁶The policy of uniformity in the application of the law as between State and Federal courts is enforced by the *Erie* and *Ruhlin* doctrine with respect to the jurisdiction based on diversity of citizenship only. Where the right is federally created, of course, a like policy requires that local rules as to burden of proof should not be employed to diminish it. *Garrett v. Moore-McCormack Co.* 317 US 239, 249.

Act. At p. 38 the amici urge that our argument involves drawing local legislation into federal equity "via the Rules of Decision Act". At p. 39 they say that *Erie R. Co. v. Tompkins* only added the decisional law of the States to the contents of the Rules of Decision Act. At p. 44 they argue that the Rules of Decision Act was never intended to apply in equity cases, quoting (as did the Court below prior to the revision of its opinion, R 53) the statement of this Court in *Russell v. Todd* 309 US at 287:

"The Rules of Decision Act does not apply to suits in equity".

All this is a misconception due to the failure to realize that the Rules of Decision Act is not the true source of compulsion upon Federal courts in diversity cases to apply local law *because that obligation existed independently of the Rules of Decision Act*. In *Mason v. United States* 260 US 545, 557, 558-9, this Court said:

"But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 358.

It was urged upon the argument that §721 of the Revised Statutes, which provides that the laws of the several States shall be regarded as rules of decision in trials at *common law* in the courts of the United States, by implication excludes such laws as rules of decision in equity suits. The statute, however, is merely declarative of the rule which would exist in the absence of the statute. *Bank of Hamilton v. Lessee of Ambrose Dudley, Jr.*, 2 Pet.

492, 525; *Bergman v. Bly*, 66 Fed. 40, 43. And it is not to be narrowed because of an affirmative legislative recognition in terms less broad than the rule. The rule that an affirmative statute, without a negative express or implied, does not take away the common law (Potter's Dwarrris, 68; Sedgwick Statutory Construction, 29, 30) affords an analogy. See *Bailey v. Commonwealth*, 11 Bush. (Ky.) 688, 691; *Johnston v. Straus*, 26 Fed. 57, 69.

There are numerous cases, both in this Court and in the lower federal courts, where the rule has been applied in suits in equity, and while §721 was not mentioned, it is scarcely possible that it was overlooked. See, for example, *Jackson v. Ludeling*, 99 U. S. 513, 519, a suit in equity, where this Court held that a law of Louisiana based upon the civil law, relating to the measure of damages, was controlling."

The *Mason* case was cited by this Court with approval in *Russell v. Todd* 309 US at 293; but, significantly enough, it is not mentioned in any brief on respondent's side of the case.

The Statute of Limitations as a Rule of Decision.

The argument made by the Central States trustees suggests a summary at this point which may be of help in putting the question in proper focus.

(a) While the Federal equity power is derived from the Constitution Article III, the grant of jurisdiction by Congress on the basis of diversity of citizenship is contained in §11 of the Judiciary Act of 1789 (quoted at p. 30 of our

main brief). This section neither prescribed procedure nor defined the law to be applied.

(b) Section 34 of the Judiciary Act of 1789 (the Rules of Decision Act), 28 USC §725, provided:

“§725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (R. S. §721).”

In 1923 (*Mason v. U.S.*) this Court held that, since the Rules of Decision Act merely enacted the law theretofore existing, the words “in trials at common law” did not constitute a restriction or exclusion with respect to equity; and thus held that Federal courts of equity also must follow the laws of the several States as rules of decision, except where the Constitution, treaties, or statutes of the United States otherwise require or provide.

(c) From 1842 (*Swift v. Tyson*) to 1938 (*Erie R. Co. v. Tompkins*) the Federal courts of common law claimed a certain independence of State decisional law on the theory that the phrase “laws of the several States” in the Rules of Decision Act referred to statutes only. From 1789 until 1938 (*Ruhlin v. New York Life Insurance Co.*) Federal courts of equity claimed a much larger degree of independence of state decisional law (except on questions of title to real estate) on the theory that the Rules of Decision Act was not expressed to govern courts of equity.

(d) *Practice* in Federal courts of law and equity was regulated by §2 of the Act of September 29 1789, as amended by the Act of May 8 1792, now 28 USC §723, providing in substance that practice at common-law should conform to that in the States and that the forms and modes of proceeding in suits in equity should be according to the principles, rules and usages which belong to courts of equity (quoted in our main brief p. 36); while pursuant to the statute, practice in equity was also governed by rules of this Court beginning July 1 1822 (7 Wheat. xvii). The Conformity Act, 28 USC §724, providing that the practice, pleadings and forms and modes of proceeding at law should conform as near as may be to the practice, pleadings and forms and modes of proceeding in the State courts, was not enacted until June 1 1872.

(e) Notwithstanding full provision made for practice and procedure in Federal courts at law, the statute of limitations has been uniformly treated in those courts as a "rule of decision" to be furnished by State law, not as a matter of practice or procedure. *Shelby v. Guy* 11 Wheat. 361, 367; *M'Elmoyle v. Cohen* 13 Pet. 312, 327; *Harpending v. The Dutch Church* 16 Pet. 455, 493-4; *Leffingwell v. Warren* 2 Black (67 US) 599, 603; *Tioga RR v. Blossburg & Corning RR* 20 Wall. 137, 150; *Davie v. Briggs* 97 US 628, 637; *Bauserman v. Blunt* 147 US 647, 652; *Michigan Insurance Bank v. Eldred* quoted at pp. 15-16 above; *Metcalf v. Watertown* 153 US 671, 673; *Balkam v. Woodstock Iron Co.* 154 US 177, 187.

There can be no question that the phrase "rule of decision" relates to substantive law only. *Wayman v. Southard*

10 Wheat. 1, 24-5, 49; *McBride v. Neal* 214 Fed. 966, 969 (CCA 7 1914).

(f) Where the State statute of limitations constitutes a comprehensive scheme barring action in equity as well as at law, like the statute of New York (our main brief pp. 7-10), it is impossible to make a distinction between the statute of limitations as a rule of decision at law and the statute of limitations as a rule of decision in equity. From the time (1923) that this Court made clear that the phraseology of the Rules of Decision Act did not stand in the way, and from the time (1938) that this Court enjoined the lower Federal courts to follow the substantive law of the State in diversity cases, the application of the State statute of limitations in equity causes where the State courts so apply them is obligatory and logically unavoidable.

(g) The application heretofore of the doctrine of laches in equity cases based on diversity of citizenship has no doubt been due to the fact that that doctrine has persisted in the jurisprudence of most of the States. The application of laches may also appear to have been sanctioned by the early equity rules promulgated by this Court. See Rule XXXIII of 1822 (7 Wheat. xvii) providing that in cases not covered by the rules, the practice of the Circuit Court "shall be regulated by the practice of the high court of chancery in England"; this provision was, however, greatly relaxed in the Rules of 1842 (Rule XC, 17 Pet. lxxvi, 20 L. ed. 919) and subsequently disappeared. We know no case based on diversity of citizenship where this Court has applied the doctrine of laches *notwithstanding* the existence of a complete scheme of limitations in the State of the

forum furnishing the "rule of decision" and excluding laches. The State statute of limitations has been accepted by this Court as furnishing the rule of decision in equity as well as in law. *Harpending v. The Dutch Church* 16 Pet. 455, 493-4 (1842). In any event the doctrine of *Ruhlin v. New York Life Insurance Co.* necessarily abolished laches in diversity cases where the local law had provided a different "rule of decision"; and it seems to us clear that this Court has so recognized in the new Rules of Civil Procedure effective September 16 1938, which are expressed to govern procedure both at law and in equity and which establish a single form of civil action. These Rules were promulgated pursuant to the Act of June 19 1934 which provided that the rules thereunder should not abridge, enlarge or modify the substantive rights of any litigant; and in connection with the pleading of affirmative defenses they definitely established laches and limitations as matters of defense *coordinate in all respects with release, payment, and other substantive defenses* (Rule 8[c]).⁷

As those substantive rights with respect to the effect of lapse of time are, for diversity cases, not defined by any act of Congress and must be found in the statutory and decisional law of the State of the forum, it follows inexorably that such local law must furnish the entire content of the defense and that in a State where limitations has superseded laches a Federal court exercising the diversity juris-

⁷The suggestion in the brief of these amici that this provision would reinstate the doctrine of laches in a jurisdiction like New York (br. p. 20) requires no notice. Obviously the effect of the rule is to recognize laches in diversity cases, only in States where it affects the rule of decision; cf. *Hohn v. Crews* 144 F. (2d) 665, 670 (CCA¹⁰ 1944).

diction cannot employ the doctrine of laches to extend the time fixed by the local law. So inevitable is this result that one of the progenitors of the *Erie R. Co. v. Tompkins* doctrine would put it on the ground that the doctrine of laches simply does not exist in such a situation (*Kuhn v. Fairmont Coal Co.* 215 US 349 at 370; *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* 276 US 518 at 532) while Brandeis J. (Stone, Roberts and Black J.J. concurring) also held in effect that in such a situation the Constitution forbids application of the doctrine of laches. 304 US 64 at 78.

CONCLUSION

The order and judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,

Attorney for Petitioner.

THEODORE KIENDL

RALPH M. CARSON

FRANCIS W. PHILLIPS

Of Counsel.

New York, January 10 1945.

APPENDIX

Federal Decisions Illustrating Concurrent Jurisdiction Rule

The thirteen cases collected in the opinion of this Court in *Russell v. Todd* 309 US 280, 289, as illustrating the doctrine of concurrent remedies are as follows:

Wilson v. Koontz 7 Cranch 202, was a bill in equity, in the nature of an attachment in chancery, to recover a debt owed the plaintiff by the surviving partner of a firm and to garnish assets of the firm in the hands of third parties. *Held* that the Virginia statute of limitations was a good bar.

Michoud v. Girod 4 How. 503 was a bill in equity by heirs of a Louisiana estate, apparently brought about 1844, to set aside a fraudulent and collusive disposition of the estate effected in 1814 of which complainants acquired notice in 1817. *Held* that length of time is no bar to a trust in cases of fraud, although such laches as would bar a complainant "if his title were solely at law" will bar him in equity (4 How. at 560-1).

Stearns v. Page 7 How. 819 was a bill brought in 1838 by an administrator *de bonis non* for a discovery and an accounting with respect to an estate settled in 1816. Fraud and concealment in the settlement of the account were alleged. *Held* that the action was barred by the Massachusetts six-year statute of limitations, which is equally obligatory in equity as at law, "in all cases of concurrent jurisdiction (as in matters of account)." (7 How. at 828).

Clarke v. Boorman's Executors 18 Wall. 505 was an action begun in 1869 by the great-grandchildren of a testator who had died in 1817 for damages for fraud and breach of trust alleged to have been committed by one of the ex-

ecutors of the estate in 1829. *Held* that the action was barred by the New York ten-year statute of limitations governing "the case of trust not cognizable at law" (18 Wall. at 505). The fact that the transactions complained of had relation to a trust did not impair the operation "of those salutary principles intended to give protection against stale claims" (p. 509).

Carrol v. Green 92 US 509 was a bill in equity to impose statutory double liability on the stockholders of the Exchange Bank of Columbia, a South Carolina corporation. This bank failed in 1865, and the action was commenced in 1872. *Held* that the action was barred by the South Carolina four-year statute of limitations, because an action at law in the nature of trespass on the case would have lain (92 US at 513) and the claim is barred in equity if it would have been barred at law (p. 516).

Godfrey v. Terry 97 US 171 was a bill in equity to enforce the statutory double liability against stockholders of the Merchants' Bank of South Carolina, a South Carolina corporation. This bank suspended payments in 1860 and the bill was filed in 1870. *Held* that the action was barred by the South Carolina four-year statute of limitations, as the liability of the defendant stockholders was a several one depending on the facts peculiar to each case (97 US at 175).

Baker v. Cummings 169 US 189 was a bill in equity filed in 1890 to cancel and annul a transaction which took place in 1886 between two law partners whereby plaintiff sold to defendant his interest in certain fees. Fraud and misrepresentation were alleged and an accounting and injunction were claimed. *Held* that the suit was barred by the Maryland three-year statute of limitations, since the existence of a remedy at law for the alleged fraud was

obvious and courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations as at law (169 US at 296).

Metropolitan Nat. Bank v. St. Louis Dispatch Co. 149 US 436 was a bill in equity to foreclose a mortgage of the plant and good will of a newspaper published in Missouri and of the newspaper's membership in a press service, the prayer asking a decree for a money payment and for the sale of the good will and certain personal property to enforce such payment. The note matured in 1879, and the bill was filed in 1887. *Held* that the action was barred by the Missouri five-year statute of limitations, since courts of equity consider themselves bound by limitations as at law in cases of concurrent jurisdiction, and plaintiff has an adequate remedy at law for conversion (149 US at 448).

McDonald v. Thompson 184 US 71 was a bill in equity filed in 1898 by a receiver to recover an assessment made in 1893 upon the stockholders of the Capital National Bank of Lincoln, Nebraska, which failed in 1893. *Held* that the action was barred by the Nebraska four-year statute of limitations (184 US at 72).

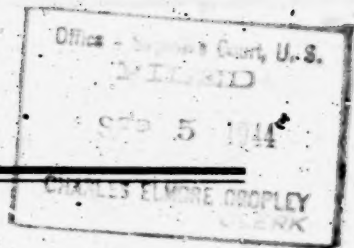
Hughes v. Reed (CCA 10th) 46 F (2d) 435, was an action in equity brought in 1923 by the receiver of an Oklahoma national bank against directors thereof to recover losses due to their permitting excessive loans and overdrafts, paying dividends improperly, etc. *Held* that all transactions prior to May 1922 were barred by the Oklahoma three-year statute of limitations, and that where the jurisdiction of law and equity are concurrent, the applicable statute of limitations of the state rather than the equitable doctrine of laches governs (46 F [2d] at 438).

Wagner v. Baird 7 How. 234 was a bill in equity filed in 1840 to acquire title to land received as a grant by complainants' ancestor in title in 1794 and purchased by defendants' ancestors in title in 1813. *Held* that the delay of 27 years constituted laches which defeated the action (7 How. at 259). The court said that in cases of concurrent jurisdiction courts of equity consider themselves bound by limitations as at law, "and this rather in obedience to the statutes, than by analogy" (p. 258).

Godden v. Kimmell 99 US 201 was a creditor's action brought in 1871 against the estate of a partner of the alleged debtor for an accounting of property claimed to have been conveyed by the debtor for payment of his debts by deed of trust in 1857. *Held* that complainants were barred by the defense of laches peculiar to courts of equity and that, even in matters of account not barred by the statute of limitations, courts of equity will not act to enforce stale demands (99 US at 210-1, citing *McKnight v. Taylor*, 1 How. 168).

Wood v. Carpenter, 101 US 135 was an action by a judgment creditor brought in 1872 to set aside alleged fraudulent transfers of property effected by defendant in 1864, under circumstances of concealment, perjury, etc. *Held* that the action was barred by the Indiana six-year statute of limitations, and that the provision of the statute tolling it in cases of concealment, which provision originated in equity, had not been pleaded with an adequate showing of facts (101 US at 139).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

GRACE W. YORK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

**BRIEF IN OPPOSITION TO THE PETITION FOR
WRIT OF CERTIORARI.**

MEYER ABRAMS,
134 North La Salle Street,
Chicago, Illinois,
BENNETT I. SCHLESSEL,
1450 Broadway,
New York, N. Y.,
Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street,
Chicago, Illinois,
Of Counsel.

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SUPPLEMENT TO SUMMARY STATEMENT.

In stating that the suit was filed January 22, 1942, to enforce a claim for breach of trust "claimed to have arisen in 1931", defendant omitted to state that plaintiff became a party to the Hackner suit, which was filed on April 26, 1940 (R. 11), within the ten year statutory period when the cause of action accrued. After the decision in the Hackner case that the plaintiff was improperly joined therein as a party, she commenced this suit, within one year from the denial of certiorari. The suit was therefore filed within the ten year period under the New York Statute of Limitations and the additional one year allowed under Section 23 of the Civil Practice Act.

The statement (p. 3) that Hackner (Eastman) "brought a representative action on behalf of note holders who had accepted the offer", is but a half-truth. Hackner did file a representative suit but after it was adjudicated that the suit could not be maintained as a class suit (117 F. (2) 95) and he was dismissed out, as a plaintiff the suit remained for the sole benefit of Eastman (130 F. (2) 300) and the complaint was amended in accordance with the mandate and all allegations as to class representation were omitted.

The holding in this case "that petitioner's breach of duty had caused damage to the plaintiff" is not "contrary" to what was held in the Hackner suit, because there the Court held (130 F. (2) 300) that Eastman, who received 50% under the "offer", did not sustain any damage because she would not have received more than 50% if the "offer" had not been accepted. In the instant case, York only received 3% out of the "segregated assets" and lost 47%, as found by the Court (R. 65-66).

While the document which Judge Bright labeled as "peculiar" (43 F. Supp. 637) provided that the "segregated assets" should not constitute collateral security for the payment of the notes as stated by petitioner (R. 14) the agreement which was executed simultaneously with the Trust Indenture provided that it was "for the exclusive" protection of the \$30,000 note issue (Hackner Record, p. 105). This agreement was executed in "fulfillment of any of the conditions on which the sale of said issue of notes was underwritten and said Trust Indenture executed" and the Trustee was authorized in the event of a default "to institute appropriate proceedings for the enforcement thereof".

The Trust Indenture provided that upon default the defendant "as trustee of an express trust" may institute any suits at law or in equity and was empowered to preserve and to protect its rights and the rights of the note holders" (p. 96) and it executed the Trust Indenture in "in evidence of its acceptance of the trust" thereby "created".

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is now fully published in 143 F. (2) 503."

THE QUESTIONS PRESENTED.

Some of the questions (1, 2 and 3) are merely presented *academically* because the Statute of Limitations was *not affirmatively pleaded* as required by the New York Law as well by the Federal Rule 8(c). Other questions (4 and 5) are not even presented *academically* because there is no "substantive law" in New York that "a chose in action" is not a *res* and that an "exculpatory clause" is a defense for an *affirmative* and willful breach of trust.

The 6th question is also only *academically* presented because *no such issue was raised* by the "pleadings". The case was disposed of on a motion for a *summary judgment*, which *did not* involve any "burden of proof" on the part of the plaintiff as she was not permitted to prove her case when the court granted the defendant's motion for summary judgment. It is also *academic* for the reason that *note holders* who held their notes since 1930 were permitted to intervene in the District Court upon the remandment of the case.*

The 7th question was *not* presented below and was not even presented by the petition for rehearing and, of course, cannot be raised for the first time in this court. The 8th question is not involved because the District Court had adjudicated on May 20, 1942, prior to the motion for the summary judgment, against the defendant when it moved to dismiss the cause on the jurisdictional grounds,** and this question cannot now be relitigated.

* See Exhibits "A" and "C" attached to motion for leave to file additional record.

** See Exhibit "B" attached to motion for leave to file additional record.

REASONS FOR THE DENIAL OF THE WRIT.

(1) - In holding that the New York six and ten year statutes of limitations need not be applied, the Circuit Court of Appeals merely discussed the questions *academically*, as the statutes were *not affirmatively pleaded*. This court will not grant a review to consider *academic questions*, and, in disposing of these academic questions the court:

(a) Did not depart from the law of the forum as fixed by the New York Civil Practice Act (Sections 48 and 53). The decisions cited by petitioner are inapplicable because this suit was filed within the statutory period, as pointed out in the opinion (R. 88).

(b) Did not deviate from its own decisions in *Shultz v. Manufacturing Co.*, 128 F. (2) 889, but distinguished it in the opinion (R. 99).

(c) Did not disregard the doctrine established by this court in *Russell v. Todd*, 309 U. S. 280, but rather followed the plain rule there announced (R. 92-93).

(d) Did not conflict with the decision of the Fifth Circuit in *Roos v. Taxes*, 126 F. (2) 767, for the reasons stated in the opinion (R. 99) nor did it conflict with the opinion of the Third Circuit in *Block and Yates v. Mahogany Assn.*, 129 F. (2) 227, but is in accord with the decision of the Third, Sixth, Seventh, Eighth and Ninth Circuits.

(2) The decision is not in conflict with the rule in *Erie* and *Ruhlin* as it clearly appears from the opinion (R. 90-92, 95-98).

(3) In declining to regard the jurisdiction of equity in this case as concurrent with that of law, the Court of Appeals did *not* depart from the established course of decision in both State and Federal Courts because:

(a) Acts requiring the construction of a trust in

indenture are exclusively within the jurisdiction of equity even under the New York decisions.

(b) The court correctly held that the question whether a pleading stated on equitable cause was governed by Federal equity law and not by State court decisions.

(4) The decision below is *not* at variance with the substantive law of New York on the three questions presented, because:

(a) All of the elements of a trust are embodied in the trust involved.

(b) The right of subsequent holders of notes to sue in respect to prior transactions was not presented by any pleading, as required; the trust indenture specifically provided that the rights of future holders should be identical with that of the previous holders by negotiation; the law is inapplicable to a suit to recover trust property which the trustee appropriated to its own use, and other note holders who were owners at the time when the breach of trust was committed have now intervened.

(c) The effect on the New York law of the exculpatory clause in the indenture is not involved because an affirmative breach of trust by the trustee was not embraced in this clause.

(5) With respect to the possible existence of an assignment of a cause of action under the New York rule, the Court of Appeals did not refuse to follow the law of the forum concerning the burden of proof, because the issue was not presented by any pleading and plaintiff against whom the summary judgment was entered cannot be charged with failure of proof when she was denied the opportunity to prove her case.

(6) The decision below does not impair the usefulness of summary judgments under the rule 56 because the rule was not adopted to enable a party to obtain a judgment on one theory and to sustain it on appeal on a different

theory. A summary judgment is not a catch penny contrivance to take an unwary litigant into its toils and deprive him of trial, and the opinion correctly applied Rule 56.

(7) Stability and due order in the administration of justice does not suggest the desirability of a review by this court in view of the fact that on substantially the same record the same court reached the opposite result. The reason for the refusal to follow the former opinions are clearly explained in the opinion (R. 82-83).

(8) The decision below is interlocutory and while this court has the power to review interlocutory orders, it will do so in unusual and exceptional cases. No such case is presented by this record.

(9) The decision below exhaustively explored each of the propositions raised by the petitioner and abundant decisions were cited as authority for the proposition of law discussed therein.

(10) The Court of Appeals reached a just decision and the petitioner will have its day in court on the merits of the case. The writ should not be awarded merely to review academic questions.

SUMMARY OF ARGUMENT.

I.

THE NEW YORK STATUTE OF LIMITATIONS IS NO BAR TO THIS ACTION.

A. Under the law of New York the action was not barred on December 15, 1937, and is not even barred now.

(1) The Statute of Limitations was waived when it was not affirmatively pleaded as required by the New York law.

(2) Rule 8(c) required that the Statute of Limitations be affirmatively pleaded, which was not done in this case.

(3) Under the Statute of Limitations of New York, this action was not barred prior to the filing of this suit.

(a) The six year statute was inapplicable.

(b) If the ten year statute applied then this suit was filed pursuant to Section 23 of the Civil Practice Act.

(c) If the six year statute applied, then it was filed within the time when the fraud was discovered under 48(5).

(4) The Statute of Limitations is inapplicable to actions which are exclusively in equity.

(a) The construction of the provisions of the Trust Agreement is exclusively in equity.

(b) A suit between a *cestui que* trust and a trustee for an accounting is exclusively in equity.

(c) A suit based on fraud which is cognizable only in equity is exclusively in equity jurisdiction.

B. The disregard by the court of the unpleaded Statute of Limitations did not violate the principle laid down for federal courts in diversity cases by the *Erie* or *Ruhlin* cases.

C. This action was not barred in 1937 under the concurrent jurisdiction rule.

(1) The remedy was not concurrent.

(2) The remedy at law, if concurrent, was impracticable and inadequate.

II.

THE OPINION BELOW DID NOT VIOLATE THE RULE IN THE ERIE AND RUTLIN CASES IN REFUSING TO APPLY THE SUBSTANTIVE LAW OF NEW YORK.

A. The Trust Indenture created a trust relationship as it contained all necessary elements.

(1) A chose in action constitutes a trust res.

(2) Even if the trust was invalid the trustee was estopped from raising such a defense.

(3) Regardless of the validity of the trust there was a fiduciary relationship.

B. The exculpatory clause was no defense because the substantive law of New York does not sanction dual loyalty.

C. Plaintiff's status as assignee does not support the summary judgment because the issue was not raised by the pleadings, and other note holders who held the notes at the time when the breach of trust was committed were allowed to become parties upon the remandment of the case.

III.

WHILE THIS COURT HAS THE POWER TO GRANT THE WRIT NOTWITHSTANDING THAT THE ORDER WAS INTERLOCUTORY, IT WILL NOT EXERCISE ITS DISCRETION EXCEPT IN EXCEPTIONAL CASES.

A. This is not an exceptional case calling for the exercise of the discretionary power of this Court.

B. Petitioner will have its day in court on the merits of the case and many of the questions will be eliminated on the trial.

ARGUMENT.

POINT I.

THE NEW YORK STATUTE OF LIMITATION IS NO BAR TO
THIS ACTION.

The "offer" was made October 29, 1931. The Hackner Suit, to which plaintiff joined as a party, was filed April 26, 1940. The dismissal of the plaintiff on jurisdictional grounds was determined on April 7, 1941, and plaintiff began this action on January 22, 1942 (R. 88). The action was brought within 10 years under the Civil Practice Act.

A. Under the law of New York the action was not barred on December 15, 1937, and is not even barred now.

The contention (p. 18) that this action was barred by the six year Statute of Limitations is completely without merit because: (1) the statute was *not affirmatively pleaded* as required by the New York law; (2) it was not affirmatively pleaded as required by Federal Rule 8 (c); (3) the cause of action accrued in 1940, the date of the discovery of the fraud; (4) the suit was filed within the ten year statutory period, and (5) the summary judgment was not based on such a defense.

(1) The statute of limitation was waived when it was not affirmatively pleaded as required by the New York law.

Petitioner *concedes* (p. 19) that it did *not* affirmatively *plead* the Statute. The defense of the Statute was *waived* when it was not affirmatively pleaded (*Devoe v. Lutz*, 133 App. Div. 356, 359; *City of New York v. Coney Island Fire Department*, 18 N. Y. S. (2) 923, 927; *Foster v. Webster*, 44 N. Y. S. (2) 153, 158.

In the Foster case the court said:

"It is an elementary rule of law that a statute of

limitations operates only as a bar to a remedy, and if not pleaded must be considered waived."

Petitioner contends (p. 19) that the defense of the statute may now be raised because its motion for summary judgment was filed before answer. Whether or not, in the event of the remandment of the case, the petitioner may still interpose a defense of the statute of limitations which is required to be filed at the earliest moment (34 Am. Jur. Section 422) is a question to be determined by the trial court upon the filing of the defense. A defendant may not obtain a summary judgment on factual issues presented by affidavits and urge on appeal that it was entitled to a summary judgment not on the factual issue on which it relied but on a statute of limitations which it failed to plead. Such a judgment may not be sustained on appeal on the authority of *A. G. Reeves Steel Construction Co. v. Weiss*, 119 F. (2d) 472, on which petitioner relies. There, the issues were *not* presented by a motion for *summary judgment*, but by a *motion to dismiss* the complaint because it appeared on its *face* that the statute intervened. The Court there held that under the Rule 9 (f), the motion to dismiss could properly raise the defense of the statute when it appeared from the complaint that the statute was a bar to the action. This has no application to a motion for summary judgment which *does not go to the pleadings but to the proof*.^{*} When a motion to dismiss raises the question of the intervention of the statute on the face of the complaint, the pleader has the opportunity to amend if he can obviate the defense. No such opportunity is presented upon the entry of a summary judgment when the point is raised for the first time on appeal, as was done in this case. The summary judgment procedure "*is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed*"

^{*} Even on the question whether the defense of the statute may be raised by a motion to dismiss the authorities are divided (*Perrott v. United States Banking Corp.*, 53 F. Supp. 953, 959, note 6).

for arriving at the truth" (*Ramsouer v. Midland Valley R. Co.*, 135 F. (2) 101, 107).

(2) Rule 8 (c) required that the statute of limitations be affirmatively pleaded, which was not done in this case.

Petitioner was in no position to urge the defense of the statute of limitations on appeal nor is it in position to raise it here as ground for the issuance of a writ of certiorari, in the absence of such a pleading as required by Federal Rule 8 (c). The defense was waived when not pleaded under Rule 12 (h) (*Chicago Great Western Ry. Co. v. Peckex*, 140 F. (2) 865, 868; *Schmidtke v. Conesa*, 141 F. (2) 634, 635). Defendant could have raised the defense on a motion for a summary judgment but it did not raise the point and the judgment was not based on such a defense and it cannot rely on such a defense on appeal (*Roe v. Sears Roebuck & Co.*, 132 F. (2) 829). In the absence of a plea of the statute below the defense was not available on appeal (*City of New York v. Coney Island Fire Department*, 18 N. Y. S. (2) 923, 927, affirmed 285 N. Y. 535; 34 Am. Jur. Section 423). It is true that the opinion of the court academically discussed the defense of the statute of limitations, but this defense need not be considered by this Court.

(3) Under the Statute of Limitations of New York, this action was not barred prior to the filing of this suit.

Had petitioner interposed its defense of the statute, it would have been unnecessary to burden this Court with a discussion which of the statutes were applicable, as was done by the petitioner. It urges (p. 7) the "six" year and "ten" year statutes, although in its brief (p. 18) it only relies on the six year statute as a complete bar, and refers (p. 19) to page 7 of its petition. There (Point I, p. 7), the "six year and ten year statutes" are commingled in the citation under I(a).

Potter v. Walker, 276 N. Y. 15, on which defendant relies deals with *both* statutes, and distinguishes between (1) an action based on "negligence", without any accounting, to which the six year statute is applicable, and (2) an action based on an affirmative breach of trust to which the ten year statute applies, and it cites *Keys v. Leopold*, 241 N. Y. 189, which is also relied on by the petitioner as applicable to (1) and not to (2). The other citations: (*Kaimanash v. Smith*, 291 N. Y. 142, *Cwerdinski v. Bent*, 281 N. Y. 782, *Dunlop's Sons, Inc. v. Spurr*, 285 N. Y. 333, *Singer v. Carlisle*, 26 N. Y. S. (2d) 172, and *Goldstein v. Tri-Continental Corporation*, 282 N. Y. 21) are discussed in *Turner v. American Metal Co.*, 36 N. Y. S. (2) 356. There, the Court said (380):

"As between the six and ten year period of limitations, the latter is applicable to this phase of the case. *This is not a simple case of money had and received within the rule laid down in Dunlop's Sons, Inc. v. Spurr, supra.* . . . Moreover, an accounting would be necessary to determine how much the Metal Company should receive in Climax stock and by way of damages from the wrongdoing defendants."

In *Heller v. Boylin*, 29 N. Y. S. (2d) 653, the Court reviewed the authorities cited by the petitioner and pointed (p. 698) to the confusion that exists in New York as to the application of the statutes and that in *Potter v. New York*, 276 N. Y. 15, the court held that "irrespective of the nature of the right, the ten year statute was applicable where the legal remedy was inadequate" and "to the extent that an accounting is necessary, *the right and the remedy must necessarily be of an equitable nature.*" After discussing the cases upon which petitioner relied, the court said (p. 699):

"The Correct rule would seem to be that the ten year statute is applicable where the law affords an inadequate remedy, whether the basic right sued upon be legal or equitable."

There, the Court also pointed out that the case was distinguishable because it "abounds in factual complexities.", and in such a case there is "clearly no remedy at law comparable to that available in equity" and therefore, the limitation at law "does not reduce the period which ordinarily limits a suit in equity." In distinguishing the *Dunlop* case (on which petitioner relies), the court said (page 700):

"Present here, however, are ingredients absent in the Cwerdinski and Dunlop cases. Of course, if simple overpayment were the only element involved, the six year limitation would control. *Davis v. Cohn*, 256 App. Div. 905, 9 N. Y. S. 2d 881; *Frank v. Carlisle*, 261 App. Div. 13, 23 N. Y. S. 2d 849; *Goldstein v. Tri-Continental Corp.*, 282 N. Y. 21, 24 N. E. 2d 728. But equitable considerations attend this case which only equity can appropriately and completely balance and administer."

A glance at the opinion in the instant case will indicate the "factual complexities," and inadequacy of the legal remedy. The opinion points out (R. 59, note 1a) the ambiguity between clause 2 and clause 3 of the trust indenture requiring the construction of the terms of the trust agreement, and expresses a "doubt" as to application of \$300,000 "excess" of the "assigned securities" under the terms of the Trust indenture, and it assumed "without deciding" that the indenture permitted such use (R. 62, Note 3). This required a construction of the terms of the trust instrument. A construction of the right to use the \$300,000 will change the damage from 47.7 per cent to 41.1 per cent as pointed out in the opinion (R. 65, Note 5). Construction of terms of a trust instrument is exclusively vested in courts of equity (*Berger v. Butler*, 48 So. 685).

The "factual complexities" also appear from the opinion. The ability of the trustee to appoint receiver in 1931 regardless of a default in interest which is to be "canvassed at the trial" (R. 63, Note 36), the expense of liqui-

dation which was estimated in the opinion at \$590,000 at "a highly generous figure" (R. 65, Note 4a), the mathematical question whether the damages range from 41.1% to 47.7% or from 38.1% to 44.7% (R. 65, Note 5), the question whether the "offer" gave to those who accepted its terms from 4% to 10.8% more in cash and deprived the non-acceptors from 39.2% to 46% or from 33.2% to 40% (R. 66, Note 6a), and the "factual complexities" which even the second Circuit Court of Appeals was unable to determine, could not have adequately been dealt with in suits at law. There are, therefore, present in this case the "ingredients" which were *absent* in the *Dunlop* case and only equity can appropriately and adequately grant the relief (*Heller v. Boylan*, 29 N. Y. S. (2) 653, *Supra*).

In disposing of the contention that under 48(5) relating to "an action to procure a judgment on the ground of fraud" only actions for "deceit" may be prosecuted from the date of the discovery of the fraud; the opinion *did not concede* that this is the New York law, but merely "assumed" (R. 89) "arguendo" the correctness of the contention. That this is not the New York law appears from the decision in *Druckerman v. Harbord*, 31 N. Y. S. (2) 867 when construed Section 48 (5). There the court said (p. 870):

The test of whether fraud is the gravamen of the action is not merely whether fraud has been alleged, but whether "there would be no injury except for the fraud." *Glover v. National Bank of Commerce in New York*, 156 App. Div. 247, 256, 141 N. Y. S. 409, 416. Here there would have been a good cause of action even though fraud had not been alleged.

The court also said (p. 871):

It is undoubtedly true, that in a proper case, although the Statute of Limitations has run against the original wrongful act complained of, there may

be an independent cause of action for fraud in inducing parties in interest to refrain from instituting appropriate action in time to prevent the claim from being subject to the statutory bar. *Brick v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, 11 N. E. 2d 902, 114 A.L.R. 521. It would seem that it is inaccurate to say that the statute has been tolled or suspended in such a situation. Whether relief for such fraud is grounded on an independent cause of action or an equitable estoppel, and the former is more logical and appropriate, the necessary allegations of fact are substantially the same in either case.

In Re Buttewort's Estate, 286 N. Y. S. 112, 115, the Court held that section 48(5) authorized the filing of a suit from the date when the cause of action was discovered applies to the *concealment* of material facts by a trustee. The statute of limitations is no bar to such equitable relief. (*Harrison v. Egan*, 270 N. Y. 387, 394.) The same rule was applied in *Wexler v. Bowman*, 285 N. Y. 284, 294.

It is apparent from these decisions that the remedy under 48 (5) is *not* confined to actions for "deceit," but is also applicable to an action against a trustee founded on fraud where "there would be no injury except for the fraud" or where a good cause of action could not have been pleaded had fraud not been alleged. *Here fraud is the gravamen of the action.* Without the allegation of the elements of fraud against the defendant for actively participating in a scheme which prevented the distribution of the "assigned securities" for the *equal* protection of all note holders, and to use such "assigned securities" for its personal benefit to the detriment of the non-acceptors, without the allegation of the "secret agreement" which was entered into with the *active* participation of this defendant in order to carry out the fraudulent scheme, and the *concealment* of these facts from the note-holders (R. 7-10), there would not have been any cause

of action against the defendant. It is because of the personal benefit which the trustee hoped to receive as a result of the offer and which it did receive, and the *concealment* thereof from the noteholders, that the opinion found that the defendant was guilty on the state of facts which it admitted (R. 67-68). Fraud consisting of the *concealment* of the material facts on the part of the trustee and its active participation in the scheme, which was detrimental to one class of the noteholders, *was the foundation of this action*.

Fraud, because of *concealment* of material facts by the trustee, is *exclusively* within the jurisdiction of the Court of Equity. Such a fraud is within the class of fraud which is *not cognizable at law* and resort must be had to equity (21 C. J. page 111). This is particularly true in dealings between "a trustee and a *cestui que trust*." Fraud in "equity" includes all acts, omissions, concealments and breaching of duty, trust or confidence, and an unconscionable advantage (*Palachek v. N. Y. Life Ins. Co.*; 263 N. Y. S. 230, aff. 268 N. Y. S. 995; *Re Harris' Will*, 285 N. Y. S. 935). Bad faith, fraud or "other breaches of trust" are "grounds for equitable relief" (*City Bank F. T. Co. v. Hewitt Realty Co.*, 257 N. Y. 62, 67).

Under all New York decisions the statute of limitations against a *cestui que trust* commences from the date when the trust is ended or when the cause of action is ascertained. The statute does not apply to an express trust (*Butler v. Foster*, 281 N. Y. S. 435, 437; *Erickson v. Quinn*, 47 N. Y. 410, 472; *Bosley v. N. M. Cal.*, 123 N. Y. 550; *Re Griffen Estate*, 10 N. Y. S. (7) 161, 162).

The opinion correctly held that the statute of limitations is no bar to this action.

(4) The statute of limitations is inapplicable to actions which are exclusively in equity.

The rule that the statute of limitations is no bar to relief in equity where a remedy is exclusive is not only confined to its Federal equity rule but is also the rule in New York as said in *Hifler v. Calmore Oil & Gas Corp.*, 10 N. Y. S. (2) 531, at page 545 the court said:

"The term analogous limitation at law refers to limitations applicable where there is a concurrent remedy as law and has no application to an action of exclusively equitable cognizance."

B. The disregard by the court of the unpleaded statute of limitations did not violate the principle laid down for federal courts in diversity cases by the Erie and Ruhlin cases.

Petitioner states (p. 19) that the doctrine of unlimited Federal "remedial rights" which the "majority below" invoked is wholly "novel" and that this is sufficient to "require a review at the hands of this Court." The Doctrine is not only that of the majority, but also of the minority, for in a dissenting opinion, Judge Augustus N. Hand says (R. 105):

"Since the rule announced in *Erie R. Co. v. Tompkins*, 304 U. S. 64, and *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, became law, I think the situation is most rare when we should disregard the local statute of limitations because the proceeding is equitable. This seems implicit in the decision in *Russell v. Todd*, 309 U. S. 280, and while, because of the footnote to the opinion found at page 288, it seems probable that *equitable claims may be asserted in extreme situations* even if the local statute of limitations has expired, I cannot believe that the present is such an occasion." (Emphasis ours.)

It is apparent from his *dissenting* opinion that he *did not dispute the power* of the Federal Court to disregard the State Statute of Limitations in exceptional cases, but he

was of the opinion that the Statute should not have been disregarded in the instant case. Whether the Statute should have been applied to the instant case may not be presented on this petition because the District Court was not given the opportunity to rule, as the petitioner did not interpose the defense. The majority of the Court, *academically* held that even if the defense was interposed, the Federal Court had the right to disregard it because *this was an exceptional case*.

The assertion that the doctrine of ¹unlimited federal "remedial rights" is "novel" is refuted by the authorities cited in the opinion (R. 89-100). In an exhaustive study of the law the opinion cites the authorities sustaining this doctrine from 1818 to 1942. The reiteration in the petition (pp. 19-20) that this was the view of the "majority" does not add anything in view of the fact that *even the dissenting opinion conceded* that the power to disregard the statute *existed* in exceptional cases. The opinion pointed out (R. 91) the fundamental error of the defendant in *not* distinguishing between "substantive rights" and "remedial rights" and that state statutes of limitations are to be regarded in the federal courts as affecting "substantive rights," and not equitable "remedial rights." Even the New York Courts have held that the Statute of Limitations are to be treated as *remedial*. (*Devoe v. Lutz*, 133 App. Div. 356; *Foster v. Walker*, 44 N. Y. S. (2) 158.)

The rule announced in *Russell v. Todd*, 309 U. S. 280, is fully discussed in the opinion (R. 93-97) and the court again pointed out defendant's "fatal" error is its failure to distinguish between "substantive rights" and "remedial rights" when it contended that the *Ruhlin* case supported its views. The only cases on which petitioner relies (*Roos v. Texas*, 126 F. (2) 767; *Shultz v. Manufacturers Trust Company*, 128 F. (2) 889), were discussed in the opinion and *clearly distinguished* (R. 99, Note 48).

The distinction which petitioner seeks to make (p. 24) between "practice" in equity and "substantive law" is *not* supported by any authority. The authorities distinguish between "substantive rights" and "remedial rights." "Equitable remedies" are *uncontrolled* by state decisions or statutes, and "Federal Equity Jurisdiction" *remains*—in the face of *Erie vs. Tompkins*—*unaffected*. (*Dunk v. Wilson Co.*, 51 F. Supp. 655, 667).

The conclusion reached in the instant case was previously announced by the Third Circuit.

In *Black & Yates v. Mahogany Ass'n*, 129 F. (2) 227, the 3rd Circuit Court of Appeals said (p. 233):

In *Sprague v. Ticonic Bank*, 307 U. S. 161, 164, 165, 59 S. Ct. 777, 779, 83 L. Ed. 1184, the Supreme Court by Mr. Justice Frankfurter, held, following earlier decisions, including *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260, that "The suits 'in equity' of which these courts (of federal equity jurisdiction) were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, *e. g.*, *Michaelson v. United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451." *We think that this must be deemed to be an indication from the Supreme Court that in so far as equitable remedies are concerned federal courts are to grant them in accordance with their own rules which have been developed out of the English Chancery practice.* The words of Mr. Justice Frankfurter in the *Ticonic Bank* case are a plain indication that the rule enunciated in *Payne v. Hook*, *supra*, 7 Wall. page 430, 19 L. E. 260, "The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union," is the law so far at least as the granting of equitable

remedies is concerned. The rule of *Erie R. Co. vs. Tompkins* being determinative of *substantive rights*, there is still preserved to the federal courts a uniform basis for granting *equitable remedies* in cases in which substantive rights have arisen under state law. (Emphasis supplied.)

This was followed in *Orth v. Transit Inv. Corp.*, 132 F. (2) 938, 915 and in *McLaskey v. Harrison Ref. Co.*, 138 F. (2) 493, 496. The Seventh Circuit so construed the rule of *Russell v. Todd* in *Philco Corp. v. Phillip Mfg. Co.*, 133 & *Savings Bank v. Iowa-Wis. Bridge Co.*, 92 F. (2) 216, F. (2) 665. The Eighth Circuit so held in *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.*, 98 F. (2) 416, certiorari denied (305 U. S. 650). The Ninth Circuit also construed the decision in *Russell v. Todd* that Federal courts are "not barred by state statutes of limitations" in *Robinson v. Linfield College*, 136 F. (2) 805, 807. Federal courts are not compelled by the *Erie* rule "to play the role of ventriloquist's dummy to the courts of some particular state" (*Richardson v. Com. of Int. Rev.*, 126 F. (2) 562, 567 and cases there cited). State precedents are not controlling in Federal court on equity pleadings (*Michelson v. Peuny*, 135 F. (2) 417).

C. This action was not barred in 1937 under the concurrent jurisdiction rule.

The contention (p. 27) that this action was barred in 1937 under the rule of "concurrent jurisdiction" is completely without merit. *Even the dissenting opinion* held (R. 106) that the "ten-year statute" was applicable. We have shown above that the action was exclusively in equity and not of concurrent jurisdiction, even under the New York law. But even in concurrent jurisdictions, the six-year statute does not apply when the legal remedy is "inadequate" or "impracticable."

This *petitioner* was the *appellant* in *Chance v. Guaranty Trust Company*, 21 N. Y. S. (2) 356, and a similar contention was there made by the defendant which was decided *adversely* to it, the Court saying (p. 357):

"The rights of the *cestui* are cognizable in equity,

which alone can decree adequate relief. The money thus received by the appellant may not in good conscience be retained by it. It was not received directly from R. Hoe & Co., Inc., but indirectly from other persons whose debts to the appellant were otherwise uncollectible by the appellant or difficult to collect. The fourth cause of action is not one at law for money had and received by appellant to the use of R. Hoe & Co., Inc. The cause of action is in equity for an accounting by the appellant for thus unlawfully profiting from its fiduciary control of R. Hoe & Co., Inc.'s corporate affairs. The six-year statute of Limitations (Civil Practice Act, Section 48; subd. 5) is, therefore, without application. *The ten-year statute applies.* (Emphasis supplied.)

The original action having been filed by Hackner in 1940 within the ten-year period, to which action plaintiff joined, and after the adjudication that she was improperly joined, she commenced this action within one year, was pursuant to Section 23 of the Civil Practice Act of New York, and the statute, therefore, was no bar to this action as held in the opinion (R. 88).

POINT II.

THE OPINION BELOW DID NOT VIOLATE THE RULE IN ERBE AND RUHLIN CASES IN REFUSING TO APPLY THE SUBSTANTIVE LAW OF NEW YORK.

The contention (p. 29) that on three points the majority of the Court have clearly departed from the substantive law of New York is devoid of merit.

A. As to the existence of the trust.

It is true as counsel say (p. 29) that under the New York law a *res* is one of the four elements of the valid trust. The existence of a *res* for the validity of a trust is not confined to New York and is *universal*. The opinion does *not* hold that *no res was essential* to the validity of a trust. On the contrary, it held that *there was a res*, consisting of a "chose in action" (R. 70). It also held that insofar as

the liability of the trust was concerned, it was of no importance whether the trust was valid because of the fiduciary relation between the defendant and the noteholders.

The contention (p. 30) that under the New York law "a chose in action" is not a *res*, is *not* supported by any decisions. On the contrary *Brodford v. State National Bank*, 24 F. Supp. 28 (on which petitioner relies) held that a "chose in action" constitutes a *res*, saying:

"There must be an asset—whether it be land, a chattel, or *chose in action*—in order to have a trust of any kind, expressed commonly implied, or impressed by law."

The New York law is the same. (*In re Kyle's Will*, 22 N. Y. S. (2), 236.) All of the authorities are in accord that "a chose in action constitutes a *res*." (Bogart on Trusts, Section 951; Perry on Trusts, Vol. 1, Sec. 68; Scott on Trusts, Vol. 1, Sec. 82; Jones on Bonds and Bond Securities, Vol. 2, Sec. 1030.)

The decision in *Brown v. Sphon*, 180 New York 201 (on which petitioner relies) does *not* hold that a "chose in action" is not a *res*. In quoting the elements required to constitute a trust (p. 30) petitioner *omitted* the words "Or a legal assignment thereof to them with the intention of passing legal title thereto to him as trustee." The *res*, the \$30,000,000 in notes, and the contract making the "assigned securities" a *special fund* for the payment of these notes, and the *transfer of the right of action* to the trustee brings this case within the rule announced in *Brown v. Sphon*, 180 N. Y. 201, which petitioner cites.

§ 16 of the trust instrument (Hackner R. 853) recites that the corporation "has obtained the execution and delivery to the trustee of an agreement by O. P. Van Sweringen and M. J. Van Sweringen with the Trustee for the benefit of the holders of the notes by which the Van Sweringens will jointly and severally undertake and agree that whenever

from time to time the aggregate value of the encumbered shares of the common stock of Allegheny Corporation . . . shall be less than 50 per cent of the outstanding notes they would "repair such deficiency by assigning and delivering or causing to be assigned and delivered to the company readily marketable securities to an amount sufficient when taken at their current market value to equal the amount of such deficiency." This *contract constituted a trust res* (Bogert on Trusts, § 17, p. 74). This agreement related to the "assigned securities" which was not the property of the corporation but was the personal property of the Van Swearingen brothers. Here was a specific *res* which was delivered in "trust" under the terms of the trust agreement. The provision in the trust indenture which stated that limitations shall not be treated as a pledge or mortgage related to the "segregated assets" but not to the "assigned securities." It did not exclude the existence of a trust.

The mere acceptance of the trust operated as an estoppel on the part of the trustee to a suit by the beneficiary against the trustee, even in the absence of a trust res. (Bogert on Trusts, Vol. 1, Sec. 143, page 426; 65 Corpus Juris, page 314.). The transfer of the right of action constitutes the trust *res*. (Underhill's Law of Trusts and Trustees, 9th Ed., p. 57.)

Article VII, § 33 of the Trust Indenture (Hackner, R. 96) contains exculpatory clauses exempting the defendant from liability "in connection with its trust except for its own willful misconduct." This operated as an *estoppel*, as said in *Clark v. Chase National Bank, supra*, 137 F. (2) 799, 801. There, Mr. Justice Augustus N. Hand, in speaking for the Court, said:

"The indentures refer to Chase throughout as a trustee and contain numerous exculpatory clauses quite superfluous unless a fiduciary relationship existed between Chase and the debenture-holders."

He concluded:

"There was *certainly a fiduciary relation* to which the obligations generally applicable to trustees would apply."

The opinion correctly held that it erred in its previous opinion when it concluded that the trust was invalid for the absence of a *res* and it corrected this error. A writ of certiorari will not be issued to review a correct decision.

The opinion also correctly held that *even if the trust was invalid, the defendant could not escape its liability, because of the existence of the trust relationship* (*Clarke v. Chase National Bank*, 137 F. 2d 797). This is in conformity with the New York law (*Cassagne v. Morrin*, 142 New York 292). There, the court held that in an equitable action, where the complaint assumed that the defendant was the trustee of an express trust, and it is shown that the defendant owes to the plaintiff duties of a fiduciary nature which a court of equity would enforce, plaintiff will not be refused relief, he is otherwise entitled to, *because the trust under which the defendant assumed to act, is not valid.*

B. As to the exculpatory clause.

The Court rejected the defense based on the exculpatory clause, because the liability of the trustee was not on the ground of "negligence," but an affirmative breach of trust, and distinguished the Hazzard Case on which petitioner relies. The contention that in not recognizing the defense of the exculpatory clause, as applied to the affirmative breach of trust, was a refusal to follow the "substantive law of New York" is without force. The Hazzard case was distinguished in *Manufacturers Trust Co. v. Kelby* (125 F. (2) 650). The Court said (p. 654):

"The comments relied upon in *Hazzard v. Chase National Bank*, 159 Misc. 57, 287 N. Y. S. 541, affirmed 257 App. Div. 950, 14 N. Y. S. 2d 147, do not mean that such trustees should not be held to such of their liabilities

as such as they do not succeed in evading by stipulations in the trust instruments; on the contrary they were made in reprobation of the extent to which they do succeed in escaping those obligations, while continuing to hold themselves out as trustees. It would be a curious irony to make use of that opinion to excuse them even from the few responsibilities that remain."

There is *no substantive law* in New York which justifies *divided loyalty* on the part of trustees. And while in the *Hazzard* case, Judge Rosenman held that the exculpatory clause in a trust indenture which authorizes the *dual loyalty* constitutes a defense, he retracted his decision in *Blaustein v. Pan American Petroleum & Transport Co.*, 21 N. Y. S. (2) 651. There he referred to the "ancient principal of equity" which demands of a trustee *undivided loyalty* to his beneficiary and he stated (p. 723):

"The **rule is based upon the public policy** of removing temptation completely from the office of a fiduciary so that it ~~will not be necessary to determine whether~~ it was the interest of the trustee or his sense of duty which prevailed."

A rule which is founded on *public policy cannot be dispensed with by the agreement of the parties*. The public policy is the substantive law of New York. And *the rule of undivided loyalty as the substantive law of New York was reiterated* recently by the New York Court of Appeals.

In *City Bank Farmers Trust Co. v. Cannon*, 291 N. Y. 125, the court said (p. 131):

The standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate. *Undivided loyalty is the supreme test*, unlimited and unconfined by the bounds of classified transactions. (*Meinhard v. Salmon*, 249 N. Y. 458, 464.)

It further said (p. 132):

We do not for a moment suggest that the trustee did not act in the utmost good faith. Both courts below so found. But that is not enough for when the trustee has a selfish interest which may be served, the law does not stop to inquire whether the trustee's action or failure to act has been unfairly influenced. It stops the inquiry when the relation is disclosed and sets aside the transaction or refuses to enforce it, and in a proper case, surcharges the trustee as for an unauthorized investment. *It is only by rigid adherence to these principles that all temptation can be removed from one acting as a fiduciary to serve his own interest when in conflict with the obligations of his trust.* (*Dutton v. Willner*, 52 N. Y. 312, 318; *Munson v. Syracuse G. & C. R. R. Co.*, 103 N. Y. 58, 74; *Meynard v. Salmon*, *supra*; *Wendt v. Fisher*, 243 N. Y. 433, 444.) *The rule is designed to obliterate all divided loyalties which may creep into a fiduciary relationship and utterly to destroy their effect by making voidable any transactions in which they appear.* (Emphasis supplied.)

In applying this rule in the opinion (R. 75) followed the "substantive law" of New York against "undivided loyalty."

C. As to plaintiff's status as assignee.

Plaintiff's capacity to sue was *not* raised by any defense as required on the rule 9 (N). *This point was not argued in petitioner's brief in the trial court and was not argued in the Brief in the Court of Appeals (R. 87).* The summary judgment was *not* entered on such a defense (R. 23-25). The point was first urged in the petition for rehearing (R. 47, 87). The opinion clearly disposed of the point *not* upon a refusal to recognize the "substantive law" of New York, but on the ground (R. 87-88) that the case was not disposed of on the pleading or on the merits, but "on a Motion for Summary Judgment" and every doubt must be resolved in favor of the respondent who had the right

to "amend to set forth the actual facts concerning the assignment." It is for this reason that the court deemed "unnecessary to consider" the instructions imposed by the New York court on suits by assignees of notes (R. 88, note 26). Had this point been raised by a "pleading" or had it been urged below as ground for the motion, respondent would have had the opportunity to amend. For this reason *Smith v. Continental Bank & Trust Company*, 292 N. Y. 275, 279 is not in point, for there the question was raised by the "pleading" and the court merely held that an assignment was necessary. The "burden of proof" as to an assignment applies to a *trial* on the merits or to a defense raised by a *motion to dismiss*. It is inapplicable to a Summary Judgment where the losing party is denied the right to offer proof.

The New York cases are also inapplicable because this suit is for the recovery of the profits which the trustee realized from the "assigned securities" which the corporation held in *trust* for the noteholders and which right of action was exclusively vested in the trustee to apply these "assigned securities" for the noteholders.

In *Manufacturers Trust Co. v. Kelby*, (125 F. (2) 650) the Court said:

"The Trust Company so particularly presses upon us *Elkind v. Chase National Bank*, 259 App. Div. 661, 20 N. Y. S. 2d 213, affirmed 284 N. Y. 726, 31 N. E. 2d 198, that we will set it out with some particularity. Unlike those we have just mentioned, the case involved the rights of bondholders against the mortgage trustee."

After discussing the facts and the reasoning underlying the decision, the court said:

"From the *Elkind* case it plainly appears—and the Trust Company does not dispute it—that if the trustee could there have been shown to have misappropriated any of the trust res, the right of action to compel restoration would have passed with an assign-

ment of the bonds, being regarded as an incident or part of the res itself. But the argument is that if the trustee disposes of a part of the res without receiving anything in return, it is merely a wrong, an 'injury' to the estate, and the remedy is personal to the beneficiaries and is not regarded as part of the res itself. It is quite true that the court presupposed that there were breaches whose remedies did not pass — perhaps the failure to foreclose was one — but there is no reason to assume that it meant to include breaches consisting of the actual unlawful surrender of the res, merely because the trustee received nothing in return, and we think the law is otherwise." (Italics ours.)

This is a suit by a beneficiary for the benefit of the entire class of the \$1,213,000 in notes whose holders were deprived of the "assigned securities" and which found their way into the hands of the Trustee. This is class suit (*Rosenberg v. Chicago Title & Trust Co.*, 128 F. (2) 245; *Citizens Bank Corp. v. Monticello State Bank* (143 F. (2) 261). The opinion held that it was a class suit under 23(a), 3 (R. 101-102). Under the New York law a class suit may be maintained by one who is not the owner of stock or bonds at the time of the accrual of the cause of action (*Klum v. Clinton Title Co.*, 48 N. Y. S. (2) 267, 268).

The complaint in the instant case was (R. 10) that the defendant breached its trust and "actively participated" in the "offer" whereby the "assigned securities" were "taken away" and "were appropriated" by the defendant, and it sought (R. 12) "an accounting" from the defendant for these assets. The corporation held the "assigned securities" in trust for the noteholders and the Trustee was given the exclusive right of action to appropriate the "assigned securities" for the exclusive benefit of the noteholders. This case, therefore, comes within the exception to the rule. Besides, the "peculiar" trust indenture differed from the ordinary indenture in that it provided

(Hackner Record 103) that *it was for the benefit of the "future holders of notes"* and without distinction by reason of "*negotiation*." The opinion pointed out (R. 87-88) that plaintiff was *not a total stranger*, because she received these notes in the dissolution of her company (R. 16). That the position of such a holder is different from a mere stranger was held in *Swoboda v. Rubin*, 169 Wis. 162.

The entire question is *academic* only because owners of notes at the time when the offer was made have filed their petition for leave to intervene in the Court of Appeals, and plaintiff consented that the petition stand as an amendment to the complaint. This was done under Rule 15 (a), before the filing of a responsive pleading and the Court of Appeals while it denied the right to file the intervening petition there, entered an order granting leave to file the intervening petition in the District Court upon the remandment of the case.* Such noteholders are now in this case.

POINT III.

WHILE THIS COURT HAS THE POWER TO GRANT THE WRIT NOTWITHSTANDING THAT THE ORDER WAS INTERLOCUTORY IT WILL NOT EXERCISE ITS DISCRETION EXCEPT IN EXCEPTIONAL CASES.

While this court has the jurisdiction to issue the Writ of Certiorari upon interlocutory orders, it will seldom issue the writ except in exceptional cases: *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258; *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408-9. This is not an exceptional case to warrant the issue of the writ. Many of the questions are presented only academically. Some of the questions will be obviated on the trial of the case. Petitioner did not obtain its judgment on the merits.

* See motion for leave to file additional record and Exhibit "C" attached hereto.

but on a motion for a Summary judgment and there is no reason why this court should grant the writ in such a case. The fact that the judgment is not final is "a sufficient ground for refusing the writ (*Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82, 91).

CONCLUSION.

This case does not involve any "novel" propositions. The rule in *Eric v. Tompkins* was clearly stated in many decisions prior to this decision and followed the views of this court in *Sprague v. Tutonic*, 307 U. S. 161, as pointed out by the Third Circuit (129 F. (2) 227). The questions were exhaustively discussed and numerous authorities were cited sustaining the ruling of the court. No reason, therefore, exists for the issuance of the writ.

Respectfully submitted,

MEYER ABRAMS and

BENNETT I. SCHLESSEL,

Attorneys for respondent.

SHULMAN, SHULMAN and
ABRAMS,

Of counsel.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

GRACE W. YORK,
Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

**MOTION SUGGESTING DIMINUTION OF RECORD
AND FOR LEAVE TO FILE ADDITIONAL RECORD
INSTANTER.**

MEYER ABRAMS,
BENNETT I. SCHLESSEL,
Attorneys for Respondent.

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INSTANTER.**

Now comes Grace W. York, Respondent by Meyer Abrams and Bennett I. Schlessel, her attorneys and suggests a diminution of the record and move for leave to file an additional record instanter as per suggestions attached.

MEYER ABRAMS,
BENNETT I. SCHLESSEL,
Attorneys for Respondent.

SUGGESTIONS IN SUPPORT OF MOTION

On the jurisdictional question whether the plaintiff had the requisite amount to maintain the cause of action in the Federal Court, which is raised by the Petitioner (pp. 7 and 8), Respondent's brief urges (p. 8) that the Petitioner is in no position to raise the point because this question was decided adversely to it on April 27, 1942 and thereafter the Petitioner moved for summary judgment not based on the jurisdictional point. This point was therefore adjudicated against the Petitioner who did not appeal from that order and is conclusive on it. (*Ripperger v. A. C. Allyn & Co.*, 113 F. (2) 332.)

A copy of Petitioner's motion to dismiss, and of the order denying the motion, is hereto attached as Exhibit "A".

On the point that Plaintiff was not the holder of the notes at the time when the cause of action accrued, Respondent urged (p. 9) among other points the fact that note holders who owned their notes at the time of the accrual of the cause of action sought leave to intervene in the Court of Appeals by their Petition for Intervention and the Plaintiff consented to the intervention and adopted the Petition as an amendment to the complaint.

While the Court of Appeals did not allow the intervention there it was without prejudice for leave to file the intervening petition in the trial court upon remandment.

A copy of the intervening petition is hereto attached as Exhibit "B" and a copy of the order of the Court of Appeals is hereto attached as Exhibit "C".

On the right to amend a pleading on appeal and on the right to file a pleading under Rule 15a, see Memorandum of Law at Pages 7 and 8 of Exhibit "B" attached hereto.

Respectfully submitted,

MEYER ABRAMS and
BENNETT I. SCHLESSEL,
Attorneys for Respondent.

**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE SECOND CIRCUIT.

No. 256

GRACE W. YORK,

Appellant,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,

A CORPORATION.

Appellee.

SUPPLEMENTAL TRANSCRIPT OF RECORD.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE SECOND CIRCUIT.

No. 256

GRACE W. YORK,

Appellant,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,

A CORPORATION,

Appellee.

SUPPLEMENTAL TRANSCRIPT OF RECORD.

**Certificate of Clerk of the District Court As to
Supplemental Record.**

United States of America,
Southern District of New York—ss.

I, George J. H. Follmer, Clerk of the District Court of
the United States for the Southern District of New York,
do hereby certify that the writings annexed to this cer-
tificate

Certificate of Clerk

Notice of Motion filed March 2, 1942;

Opinion of Vincent L. Leibell, U. S. D. J., filed April 27, 1942;

Order filed May 20, 1942, in the case of Grace W. York against Guaranty Trust Company of New York, a corporation, Civil Action No. 17-165,

have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

"In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 6th day of April in the year of our Lord one thousand nine hundred and forty four and of the Independence of the United States the One Hundred and Sixty-eighth.

George J. H. Follmer, Clerk.

Motion

Motion Filed March 2, 1942

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 17-165

GRACE W. YORK,

Plaintiff,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,
a corporation,

Defendant.

Notice of Motion

Sirs:

Please Take Notice that upon the summons and complaint herein, and the record in *Elias Hackner, et al. v. J. P. Morgan, et al.*, Civil Action File No. 8-344, the undersigned will, pursuant to Rule 12 of the Rules of Civil Procedure, move at a day for the hearing of motions, at the United States Court House, Foley Square, New York, New York, March 17, 1942, at 10:30 A. M., or as soon thereafter as counsel can be heard, for an order dismissing the above entitled action on the ground that the Court

Notice of Motion

lacks jurisdiction over the subject-matter thereof, together with such other and further relief as may be just.

Dated: New York, N. Y., March 2, 1942.

Yours, etc.,

Davis Polk Wardwell Gardiner & Reed,
Attorneys for Defendant Guaranty
Trust Company of New York,
Office & Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

To:

Bennett I. Schlessel, Esq.,

and

Shulman, Shulman & Abrams, Esqs.,
Attorneys for Plaintiff,
1450 Broadway
New York, N. Y.

Memorandum Opinion Filed April 27, 1942.

[SAME TITLE]

Leibell, D. J.

Defendant moves in this action (Civil 17-165) upon the summons and complaint herein and the record in another suit, *Elias Hackner et al. v. J. P. Morgan et al.*, (Civil 8-344). (117 F. (2d) 95), for an order dismissing this action on the ground that the Court lacks jurisdiction of the subject matter (Rule 12(b) F. R. C. P.).

This is alleged to be a class action by the plaintiff, the holder of six \$1,000 notes issued by the Van Sweringen Corporation under a trust indenture of which the defendant was the trustee. Plaintiff seeks an accounting by the defendant trustee of certain trust funds allegedly misappropriated by the trustee for its own use and benefit, to the damage of plaintiff and other note holders.

The motion of the defendant is directed solely to the jurisdiction of this Court—is the plaintiff's claim for a sum in excess of \$3,000, exclusive of interest and costs? Defendant relies upon the opinion of the Court of Appeals in the earlier suit of "*Hackner v. Morgan et al.*", *supra*. The facts in that action are fully set forth in the Appellate Court's opinion and need not be repeated here. The Hackner suit was described by the Court, at page 97 of its opinion, as follows:

"The claim here stated is for misrepresentation, whereby the plaintiffs were induced to make a sale of their notes for less than their true value. Clearly, each plaintiff, to prevail, must show that he himself was misled by the defendant's misrepresentations, and that as a result he sustained a loss."

Memorandum Opinion

The Hackner suit originally had three plaintiffs who were suing on behalf of themselves and all other note-holders similarly situated. The largest noteholder was Bowman who held a \$5,000 note. These noteholders had surrendered their notes for 50% in cash and 50% in common stock of the Van Sweringen Corporation. The sole question in the Appellate Court was whether or not the amount in controversy exceeded, exclusive of interest and costs, \$3,000. 28 U. S. C. A. Sec. 41 (1):

Grace W. York was not originally a party to the Hackner suit. The plaintiffs in that suit sought to serve an amendment to their complaint adding Miss York and one, Eastman, (who had held a \$10,000 note) as parties plaintiff. The lower court refused to accept the amendment and dismissed the action for want of jurisdiction. The appellate court referred to this offered amendment and the status of plaintiff York from a jurisdictional viewpoint, as follows:

"The proffered amendment added one plaintiff, York, who had never transferred her bonds; seemingly, therefore, she sustained no damage, but at any event, the possible loss of 50 per cent of her investment of \$6,000 would be just under the required amount. * * * As to York, there cannot exist jurisdiction any more than as to the original plaintiffs, and it cannot be supplied for her or for them by adding a plaintiff who can show jurisdiction."

Thereafter plaintiff York instituted this action, on behalf of herself and all other noteholders similarly situated, a group holding \$1,213,000 in notes, who had not surrendered their notes under the 50 per cent cash, 50 per cent stock arrangement, as had the plaintiffs in the Hackner suit. An analysis of her complaint herein reveals that it charges the indenture trustee with the acquisition of secret profits from an alleged breach of its fidu-

7

Memorandum Opinion

ciary duty to the plaintiff noteholders, the beneficiaries of the trust herein. The alleged acquisition of these illegal benefits was some time after the note arrangement offered in November 1931; in fact, the complaint alleges that some of the proceeds thus acquired by defendant came from a sale of collateral, September 30, 1935 (Par. 14). It appears from Exhibit D, annexed to the complaint, that the offer to the noteholders was conditioned upon the deposit of the notes on or before December 1, 1931. Plaintiff did not deposit her \$6,000 in notes. She could not be forced to do so. Whatever arrangement was made by others was voluntary. This was something new—not contemplated by the indenture. Apparently plaintiff received interest for one year after November 1, 1931 (Par. 15).

The Hackner suit was for misrepresentation in connection with the surrender of notes for cash and common stock. Obviously if plaintiff York was not deceived and did not surrender her notes, she had no cause of action for misrepresentation for any amount. But that does not mean that she may not have a cause of action for loss occasioned by alleged wrongdoing of the defendant through other acts of the trustee.

It is true that in the Hackner case certain allegations of breach of trust were present but the Circuit Court stated that the gist of the action was for misrepresentation in connection with the offer for the surrender of the notes in question. Here additional allegations of breach of trust and profit to the defendant trustee appear in paragraphs 8, 9, 10, 13, 16, and 18 of the complaint. The theory of this action is that the defendant as trustee through a breach of trust secretly acquired assets of Van Sweringen Corporation, and profits from the sale of said

Memorandum Opinion

assets, all of which should have been available to plaintiff, resulting in a loss to plaintiff of almost her entire \$6,000 investment. Paragraph 21 of the complaint herein alleges:

"21/ The Van Sweringen Corporation is wholly insolvent and no substantial recovery can be had against it, and the plaintiff and the other note-holders stand to lose the entire face value of the outstanding notes."

Defendant's motion to dismiss the complaint on the ground that the amount in controversy with respect to plaintiff York does not exceed \$3,000 exclusive of interest and costs, is denied. In so deciding I am not passing upon the sufficiency of the complaint or upon the question of whether or not this is a proper class action. It is also unnecessary to comment on other points advanced in the briefs of the respective parties.

Settle order on notice.

Dated April 27, 1942.

Vincent L. Leibell,
United States District Judge.

Order Entered May 20, 1942

[SAME TITLE]

The above named defendant, Guaranty Trust Company of New York, having moved under Rule 12 of the Rules of Civil Procedure to dismiss this action on the grounds that the Court lacked jurisdiction over the subject matter of the cause of action set forth in the complaint, and the said motion having duly come on to be heard,

It is on motion of Benfett I. Schlessel and Shulman, Shulman & Abrams, attorneys for plaintiff,

Ordered, that the defendant's motion to dismiss this cause of action on the ground that the Court lacked jurisdiction of the subject matter thereof be and the same is hereby denied in all respects.

Further Ordered, that defendant's time to answer the complaint herein be extended to and including June 5, 1942.

Dated: New York, N. Y., May 20th, 1942.

Vincent L. Leibell,
U. S. D. J.

Exhibit B

**UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE SECOND CIRCUIT.**


No. 256

GRACE W. YORK,

Plaintiff-Appellant,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,

A CORPORATION,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

**INTERVENING PETITION OF NOTEHOLDERS AND
MEMORANDUM OF LAW IN SUPPORT
OF PETITION.**

MEYER ABRAMS and

BENNETT L. SCHLESSEL,

*Attorneys for Appellant
and Petitioners.*

LESLIE M. O'CONNOR,

Counsel for Baseball, et al.,

One of the Petitioners.

**UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE SECOND CIRCUIT.**

No. 256

GRACE W. YORK,

Plaintiff-Appellant,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,

A CORPORATION,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

**Intervening Petition of Noteholders Who Purchased Their
Notes Prior to the Offer of October 29, 1931, for Leave
to Intervene and to Be Joined As Parties-Plaintiffs and
Appellants and to Amend the Complaint Accordingly.**

*To The Honorable The Judges Of The United States
Circuit Court Of Appeals For The Second Circuit:*

Petitioners, First National Bank of Stillwater, Oklahoma, Emma W. Steele of Chicago, Illinois, Elva Lamberson of Arlington, Virginia, Gus Stern of Orlando, Florida, and Leslie M. O'Connor as Secretary and Treasurer

of "Baseball", a voluntary association, with the consent of Grace W. York, plaintiff, file this petition and respectfully show:

(1) Petitioners are owners of notes aggregating \$39,000 of the \$30,000,000 note issue of the Van Sweringen corporation of May 1, 1930, which notes were purchased by them when they were originally marketed in the year 1930 and are held by them since then.

(2) Petitioners first discovered the facts leading to the cause of action herein after the rendition of the opinion of this Court on March 2, 1944; and for the protection of their rights seek to intervene on this appeal, as well as in the court below and to amend the complaint accordingly.

(3) The amount of the notes held by petitioners is as follows:

- (a) Petitioner, the First National Bank of Stillwater, Oklahoma, is the owner of notes numbered M 8094 and 8095 in the amount of \$2,000, together with interest coupons subsequent to November 1, 1932, which are unpaid. These notes were purchased in May 1930.
- (b) Petitioner, Emma W. Steele of Chicago, Illinois, is the owner of \$2,000 of these notes, together with interest coupons subsequent to November 1, 1932, which notes were purchased by her in May, 1930 and on which principal and interest are unpaid.
- (c) Petitioner, Elva Lamberson of Arlington, Virginia, is the owner of a \$1,000 note which she purchased in May, 1930, together with interest coupons subsequent to November 1932, which note and interest coupons are unpaid.

- (d) Petitioner, Gus Stern of Orlando, Florida, is the owner of \$3,000 of these notes, which he purchased in May, 1930, together with interest coupons there-to attached, subsequent to November 1, 1932, on which the principal and interest are unpaid.
- (e) Petitioner, "Baseball", is a voluntary association of which Leslie M. O'Connor is Secretary and Treasurer and the Honorable Kenesaw M. Landis is Commissioner and it exists under a written agreement dated January 12, 1921, comprising the following corporations:

The National League of Professional Baseball Clubs

The American League of Professional Baseball Clubs

Boston National League Baseball Company

Brooklyn National League Baseball Club

Chicago National League Ball Club

The Cincinnati Baseball Club Company

National Exhibition Company

The Philadelphia National League Club

Pittsburgh Athletic Company

St. Louis National Baseball Club

Boston American League Baseball Club

American League Baseball Club of Chicago

The Cleveland Baseball Company

Detroit Baseball Company

American League Baseball Club of New York, Inc.

American Baseball Club of Philadelphia

St. Louis American League Baseball Company

Washington American League Baseball Club

This petitioner is the owner of \$33,000 of these notes and of interest coupons attached thereto subsequent to November 1, 1932. These notes were purchased between the period commencing June 1, 1930 and ending January 23, 1931.

(4) The complaint in the instant case was filed by plaintiff as a class suit for the benefit of those who did not accept the offer of October 29, 1931 and it alleges in paragraph 22 as follows:

"Plaintiff, therefore, brings this action in her own right and for the common use and benefit of the entire class of the \$1,213,000 notes and interest due thereon from November 1, 1932. The interest of the plaintiff as beneficiary under the trust indenture is identical and in common with the interest of all other beneficiaries under the trust agreement who are holders of the outstanding notes in the aggregate amount of \$1,213,000. All of such noteholders are jointly and commonly interested in the proceeds received by the defendant, the Trustee of the bond issue, and appropriated to its personal use and benefit out of 'assigned securities'. They are also jointly and commonly interested in the cause of action against the defendant, as Trustee of the note issue, for the breach of faith and infidelity. The noteholders are widely scattered and it would be too expensive to join them as parties, and the plaintiff, therefore, files this suit for their joint benefit as a class suit."

(5) The defendant has filed a petition for rehearing, urging, among other things, that the plaintiff, Grace W. York, acquired her notes subsequent to the date of the offer. In order to preserve the rights of these petitioners who have acquired their notes prior to the offer, petitioners present this petition, seeking to intervene to be made parties to the proceedings below as well as to this appeal, and for leave to amend the complaint.

(6) Due to the fact that the defendant is relying on the defense of the statute of limitations and that it may also interpose a defense of laches, petitioners believe that it is their duty to seek the intervention at the first opportunity of learning the facts and they, therefore, present

this petition to this court, seeking leave to join as parties-plaintiff and appellants, so that their petition may stand as an amendment to the complaint and if this court will deem it proper, they ask leave to file an amendment to the complaint to embrace all of the facts which appear in the documents upon which the summary judgment was based.

(7) Petitioners received the "offer" and had no knowledge of any of the facts except such as were disclosed in the offer. When they received the offer in October, 1931, they believed that as non-acceptors, their share in the assets of the Van Sweringen Corporation would be larger than what they were to receive under the offer. Since the filing of the opinion in this cause petitioners discovered the true facts were concealed from them. The Trustee actively participated in the promulgation of the offer and concealed the true facts from these petitioners.

(8) The plaintiff, Grace W. York, hereby joins in the request and consents to the joinder of the foregoing parties as plaintiffs and as appellants and to the prayer contained in the petition.

Wherefore, petitioners pray for the following relief:

(a) That this court may permit the intervention of the petitioners and to be joined as appellants here.

(b) That upon the remandment of the case in the event of the denial of the rehearing, this court may direct that the petitioners be granted leave to intervene as parties-plaintiffs below.

(c) That the petition may stand as an amendment to the complaint of Grace W. York, or, in the alternative, that the court may direct that the complaint be further

amended by permitting the plaintiffs to embrace all of the admitted facts as they appear in the documents upon which the defendant moved for a summary judgment.

That the court may grant such other relief in the premises as it may consider proper for the protection of the rights of the petitioners and the other members of the class.

FIRST NATIONAL BANK OF STILLWATER,
OKLAHOMA
EMMA W. STEELE
ELVA LAMBERSON
GUS STERN

By MEYER ABRAMS,
Their authorized agent and attorney.
PETITIONERS "BASEBALL", ET AL.,

By LESLIE M. O'CONNOR,
*Secretary and Treasurer and duly
authorized agent and attorney.*

State of Illinois,
County of Cook—ss.

Meyer Abrams being first duly sworn, on oath deposes and says that he is the attorney for the plaintiff, Grace W. York, in the above entitled appeal; that he is also the attorney and duly authorized agent for the foregoing petitioners; that he has read the foregoing petition by him prepared, knows its contents and that it is true in substance and in fact.

MEYER ABRAMS.

Subscribed and sworn to before
me this 21st day of April, 1944.

YETTA GERTLER,
Notary Public.

MEMORANDUM OF LAW IN SUPPORT OF PETITION.

STATEMENT.

Petitioners, owners of notes aggregating \$39,000, who purchased their notes when they were originally sold in 1930, desire to intervene as parties-plaintiffs and appellants. Plaintiff joins in their petition for leave to join them and that the intervening petition may be treated as an amendment, or that leave be granted upon the remandment to file an amended complaint embracing the subject matter of the intervening petition.

I.

On the Right to Amend on Appeal.

Rule 15 (b) authorizes amendments "at any time even after judgment". It is designed to enable decisions on merits and not on technicalities. (1, Moore's Federal Practice, p. 787).

Even prior to Rule 15 (b), it was permissible to file an amendment in the Appellate Court (1, Moore's Federal Practice, p. 790). There the author cited *Gulf Smokeless Coal Co. v. Sutton, Steele & Steele* (35 F. (2) 433). The same construction was held under the New Federal Rules in *Mid-Continent Pipe Line Co. v. Whitley*. (116 F. (2) 871, 872).

Under the liberal policy of the courts, the Appellate Court would permit amendments in the same suit without compelling the parties to resort to new suits (*Downe v. Palmer*, 114 F. (2) 116, 117). While we do not concede that the original plaintiff may not maintain the

action in view of the authorities cited in our brief, yet to avoid this technicality, we ask leave to join the other noteholders as parties plaintiffs and to amend the complaint accordingly.

II.

On the Right to Intervene.

Plaintiff brought her suit in a class action for the benefit of all noteholders (Tr. 11-12). This Court held in its opinion that the members of the class may intervene below after trial. In view of the issues raised by the defendant on the rehearing, petitioners believe that in order to protect their rights, it is necessary for them to seek intervention prior to trial and without delay. Due to the fact that this is a class action and that the appeal was for the benefit of the entire class, their right to join in the appeal is not open to objection. (*Hirsch & Co. v. Scott*, 100 So., 157, 160). See also *William v. Morgan*, 111 U. S. 684, 699; *United States v. St. Louis Terminal*, 236 U. S. 194, 199.

The right of intervention is also, by virtue of Rules 21 and 24 of the New Federal Rules. Rule 21 provides:

"Parties may be dropped or added by order of the Court on motion of any party, or of its own initiative at any stage of the action and on such terms as are just."

Similar Rules were construed as authorizing intervention on appeal by way of amendment. (*Windes v. Colwell*, 247 Michigan, 372, and *Southern Railway Co. v. Lancaster*, 149 Georgia, 434.)

This Court may treat the intervening petition as an amendment to the complaint without any formal order to amend. In *Seaboard Terminal Corporation v. Standard Oil Co.*, (104 F. (2) 553), in a *per curiam* opinion this Court said (p. 660):

"The judgment finally disposes of the action, and if facts appear in affidavits which would justify an amended complaint, there may be ground for treating the complaint as though it were already amended to conform."

For the foregoing reasons, we urge the allowance of the intervention and that the petition may stand as an amendment to the complaint.

Respectfully submitted:

MEYER ABRAMS and
BENNETT I. SCHLESSEL,

*Counsel for Appellant and
Petitioners.*

LESLIE M. O'CONNOR,

*Counsel for Petitioner,
"Baseball"*

EXHIBIT "C".

ORDER OF THE COURT OF APPEALS

Of May 25, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit.

Grace W. York.

Plaintiff-Appellant,

vs.

Guaranty Trust Company of New
York,

Defendant-Appellee.

Before: L. HAND, AUGUST N. HAND and FRANK, *C. JJ.*

The opinion herein, dated March 2, 1944, is hereby recalled and the revised opinion of this date is substituted therefor. Appellee's petition for rehearing is denied. The motion of appellant for leave to file a supplemental record is denied. The petition of First National Bank of Stillwater, Oklahoma, *et al.*, to intervene is denied without prejudice to the filing of such a petition in the district court when this case is remanded.

LEARNED HAND,

Circuit Judge.

AUGUST N. HAND,

Circuit Judge.

JEROME N. FRANK,

Circuit Judge.

FILE COPY

Office - Supreme Court, U. S.

JAN 2 1945

CHARLES ELMORE CROPLEY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

vs.

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT.

✓ MEYER ABRAMS,

134 North La Salle Street,
Chicago, Illinois,

BENNETT I. SCHLESSEL,

1450 Broadway,
New York, N. Y.,

Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS,

134 North La Salle Street,
Chicago, Illinois,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. _____

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner

vs.

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Matter Omitted From the Statement of the Case.

Petitioner's statement of the case omitted to state that Respondent, York, joined in the suit which was commenced by Hackner and that after she was dismissed out of the case on jurisdictional grounds (*Hackner v. J. P. Morgan, et al.*, 117 F. (2d) 95), she commenced this action within one year (R. 11) after the denial of certiorari here (313 U. S. 559): Hackner's suit was filed on April 26, 1940 (Hackner Record p. i) within the 10 year statute of limitations, and this suit was filed on January 22, 1942, within one year after the final determination that the court was without jurisdiction of her claim, pursuant to Article 2, Section 23 of the New York Civil Practice Act.

SUMMARY OF ARGUMENT.

1. The New York Statute of Limitations is not determinative of this action, and the review was limited to the question as presented on Page 2 of Petitioner's Brief and does not involve this question.

2. The New York Statute of Limitations as applied by the New York Courts does not involve substantive rights and need not be enforced in Federal Courts in diversity suits where it would be inequitable to do so.

3. The doctrine of "remedial rights" rests upon a correct construction of the Judiciary Act and upon the decisions of this Court as well as the decision of the ten Circuit Courts of Appeals and of the leading authorities.

I.

The New York Statute of Limitations Is Not Determinative of This Action.

Petitioner's contention (p. 7) that the New York Statute of Limitations is *determinative* of this action is untenable because (a) no such question is pending here and (b) it is completely without merit.

(a) The limitation of the review to the question whether in an equity case Federal Courts are bound by State Statutes of Limitations excludes the question whether the New York Statute of Limitations is determinative of this action.

The question whether the New York Statute is a bar to this action was raised by the *third* question of the Petition for Certiorari (p. 6). In opposing the Petition on this

point (p. 9), Respondent showed (1) that the Statute of Limitations was *waived* when it was not affirmatively pleaded under the New York law (*Deroe v. Lutz*, 133 App. Div. 356, 359; *City of New York v. Coney Island Fire Dept.*, 18 N. Y. S. (2) 923, 927; *Foster v. Webster*, 44 N. Y. S. (2) 453, 458); (2) that the Statute was *not affirmatively pleaded* under Rule 8(c) and was thereby waived (*Chicago Great Western Ry. Co. v. Peeler*, 140 F. (2) 465, 468; *Schmidtke v. Conest.*, 141 F. (2) 634, 635) and that such a defense could have been raised on petitioner's Motion for a Summary Judgment, which it did not raise and such question was, therefore, *not* available on review. (*Roe v. Sears-Roebuck & Co.*, 132 F. (2) 829; *City of New York v. Coney Island Fire Dept.*, 18 N. Y. S. (2) 923, 927, and 285 N. Y. 535), and (3) that (p. 11) under the New York Statute of Limitations this action was *not barred* prior to the filing of this suit.

When this court limited the review to the *first* question involving a purely equitable action, it thereby *denied* any of the contentions on the other questions.

(b) This action is not affected by the New York Statute of Limitations

While the question whether the New York Statute of Limitations is determinative of this action, is *not* involved here, yet, because of the discussion of this point in Petitioner's Brief, we will dispose of the point on the merits.

Under the settled law of New York, the 10 year Statute of Limitations is applicable to such actions (*Potter v. Walker*, 276 N. Y. 15; *Turner v. American Metal Co.*, 36 N. Y. S. (2) 356, 380; *Heller v. Boylan*, 29 N. Y. S. 653, 699). The offer to exchange the \$30,000,000.00 notes for half in cash and half in stock was made Oct. 29, 1931 (R. 7). Within the 10 year Statute, the Hackner suit was

filed on April 26, 1940. (Hackner Record p. 1) to which the respondent, York, was joined as a party plaintiff. This suit was dismissed on *jurisdictional* grounds (117 F. (2) 95) which dismissal became final on April 7, 1941, when this Court denied certiorari (313 U. S. 559). This action was filed January 2, 1942 (R. 1) *within* the additional one-year period as allowed by Section 23 of Article 2 of the Civil Practice Act of New York (*Gustafson v. Swedish American Lines*; 258 App. Div. 734; *Gains v. City of New York*, 215 N. Y. 533; *Johnson v. U. S.*, 68 F. (2) 588). The opinion (R. 69, 143 F. (2) 503, 511) pointed out that the action was filed within the year allowed by the Statute. The limitation of the review by this Court to the first question presented by the Petition eliminates, therefore, from the discussion, the point now urged that the New York Statute of Limitations is determinative of the action. There is no such question here and if there is, we have shown that the Statute is not determinative of this action.

Article 2, Section 23 of the New York Civil Practice Act (Thompson's Laws of New York, 1939 Ed., Vol. II, Page 1623) provides:

"If an action is commenced within the time limited therefor, . . . or the action is terminated in any other manner, than by voluntary discontinuance, a dismissal of the Complaint . . . or a final judgment upon the merits, the plaintiff . . . may commence a new cause of action for the same cause after the expiration of time so limited and within one year after such reversal or determination."

(e) The doctrine of laches was not superseded by the Statute of Limitations.

The assertion (p. 9) that the "ancient equity principle of laches" as applicable to stale claims "has in New York been superseded" by the Statute of Limitations, is incor-

rect. The New York Courts have expressed a "doubt" and have *not* determined that question, in petitioner's favor.

In *Car v. Stokes*, 156 N. Y. 491, the Court of Appeals expressed a *doubt* whether the equitable doctrine of laches as distinct from the Statute of Limitations is available. This *doubt* was reiterated in *Treadville v. Clarke*, 190 N. Y. 58, 60, and the "doubt" was resolved in *favor* of the doctrine of "laches" in *Re Milderberger's Estate*, 17 N. Y. S. (2) 79, 80 (1940)). The application of the doctrines of laches "wholly independent of the Statute of Limitations" was adopted in *Groesbeck v. Morgan*, 206 N. Y. 385, 389. While in the *Groesbeck* case the doctrine of laches was applied to *shorten* the period of the Statute of Limitations, the doctrine of *laches* was applied to *lengthen* the period and to *remove the bar of the Statutes* in *Dodds v. McColgan*, 229 App. Div. 273 (1930). There, the Court said (p. 277):

"The *denial* to the defendant of the benefit of the Statute of Limitations is within the power of a Court of equity. As stated by the Court in *Clarke v. Gilmore*, (149 App. Div. 445, 450): 'Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations.' The conclusion there reached is in accordance with the judgment for plaintiff in *Lightfoot v. Davis* (198 N. Y. 263), where *though an action of conversion was barred by the Statute of Limitations, the Court allowed recovery in equity* for bonds stolen many years before by defendant's testator, who had fraudulently concealed his possession of them, until the Statute had run. Like relief has been granted in cases nearly parallel *where equity has prevented the Statute becoming an instrument in aid of fraud.*" (Emphasis ours.)

The Court cited as authority the decision of this Court in *Bailey v. Glover*, 88 U. S. 342:

It is evident therefrom that *the New York Courts are in accord with the decision in the instant case that a Court of equity may, in extraordinary cases, ignore the Statute of Limitations as a defense when not to do so, would aid a fraud.*

The discussion in Petitioner's Brief (pp. 9-14) of the question whether this was an equitable suit or a suit for damages or whether the 6 or 10 year Statute of Limitations are applicable is *not involved here* because of the limitation of the review to the question whether in purely equitable suits Federal Courts must recognize State Statutes of Limitations in diversity cases.

II

The New York Statute of Limitations as Applied by the New York Courts to Like Actions Brought in Equity Is Not Part of the Substantive Law of New York, But Is Remedial Only and as Such Need Not Be Enforced by Federal Courts in Equity Cases in Diversity Suits.

Petitioner *concedes* (p. 15) that under the New York decisions the Statute of Limitations "discharges the remedy" *without impairing the right*, but argues that the discharge of the remedy "remains a part of substantive law" because it is "rooted in sound and well established public policy." Petitioner starts out with the Roman law, refers to the English law, and cites New York decisions on the purpose of the Statute of Limitations and quotes from a decision by Mr. Justice Story, rendered in 1828, as to the scope and purpose of Statutes of Limitations. The purpose of the Statute was also defined by Mr. Justice Story in another case which is cited by this Court in *Exploration Co. v. United States*, 247 U. S. 435. There, this Court quotes from the decision of Mr. Justice Story, the following:

"What then, is the reason, upon which this *except*

tion has been established? It is, that every statute is to be expounded *reasonably*, so as to *suppress*, and *not to extend*, the mischiefs, which it was designed to cure. The statute of limitations was mainly intended *to suppress fraud*, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the other party, by which they could be repelled. *It ought not, then, to be so construed, as to become an instrument to encourage fraud*; if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity according to the nature of their respective jurisdictions. Such, it seems to me, is the reason, on which the *exception* is built, and not merely, that there is an *equity* binding upon the *conscience* of the party, which the statute does *not* reach or control."

This Court then said:

"*Bailey v. Glover* has never been overruled nor modified in this court and has been approved and followed" (Emphasis ours)

citing among other cases, *Kirby v. Lake Shore & Michigan Southern Railroad*, 120 U. S. 130, 136.

The fact that the purpose of the Statute "like the equitable doctrine of laches" is to prevent "surprises" to the revival of claims that have been allowed to slumber until the evidence has been lost, does not eliminate the like equitable doctrine that while such Statutes were designed "to prevent frauds", the Statute will not be applied to prevent parties from asserting their rights as to a cause of action which was *concealed* until after the lapse of the period of limitations, because to apply the Statute in such a case would be aiding a fraud, instead of preventing a fraud (*Dodds v. McColgan*, 229 App. Div. 273, *supra*). This was also the distinction made in *Exploration Co. v. United States*, 247 U. S. 435, 449, from *United States v.*

Chandler-Dunbar Co., 209 U. S. 447, on the ground that in the latter case "no question was made as to the effect of concealment of fraud until after the running of the Statute".

The assertion (p. 18) that in the Courts of New York "it is clear" that "no litigant can prolong the term granted him by law" by invoking the "equitable principles" which was adopted in the instant case, is *refuted* by the New York decisions above cited.

Not a single case is cited in Petitioner's Brief on the point that the Statute of Limitations in New York is treated as "substantive law", as distinguished from "remedial law". Respondent cited the New York cases which run counter to the assertion:

In *MacCae v. MacCae*, 182 Misc. 910, decided by the Supreme Court of New York in 1944, it was held that "concealment with intent to defraud of facts which one is in duty bound in honesty to disclose is in legal effect and significance, as affirmative misrepresentation of fact" and that an action may be commenced from the date of the discovery of the fraud. This is in accord with the decision in the instant case (R. 67) that the defendant, as Trustee, did not furnish the information to the noteholders, and that the written offer "was completely silent as to the existence of the loan by the lending banks". *Wexler v. Bowman*, 285 N. Y. 284, 294. The Opinion states (R. 72, 143 F. (2d) 503, 513:

"On the facts now before us, we cannot say that the offer plan did not involve substantial actual and anticipated potential selfish advantages to the trustee, and did not create such an adverse interest as, absent full disclosure of the facts to the noteholders, imposed liability on it for losses to non-acceptors. For, as we saw, the plan, when agreed upon, was not at all unlikely to confer benefits on the trustee, as one of the lending banks, which it would not obtain

if, as trustee, it caused the debtor's liquidation. Thus, as above noted, it was then obvious that, should the holders of \$3,500,000 of notes refuse the offer, the lending banks, under the plan, would receive \$1,250,000.00 not available to them on the debtor's liquidation. In fact, they did receive \$106,000 under the plan. Also the trustee knew that, under the plan, those banks would in all likelihood become holders of some of the uncanceled notes and that, if they did, they would subsequently share in the then anticipated minimum realization of \$500,000. Also, the trustee appears to have believed that the substitution of the offer plan for liquidation of the debtor would prevent receiverships or bankruptcy of Vaness and the debtor's subsidiary; if so, the plan would benefit the banks by preventing injurious effects on the loans by those banks to those companies.

The Court further said (R. 76, 143 F. (2) 503, 515):

"The trustee owed an equal duty to all its beneficiaries; cf. Restatement of Trusts, § 183. Those who suffered have a right to demand that the trustee put them in the financial position which they would have occupied had it acted for the equal benefit of all."

It further said (R. 80, 143 F. (2) 503, 517):

"Accordingly, on the facts now before us, there was no adequate disclosure to a noteholder that, in the trustee's opinion, if he did not accept the offer, and other noteholders did accept in a sufficient amount to reduce the note issue to \$15,000,000, in all probability he would recover very substantially less than if he accepted. Nor was he told (fol. 94) that liquidation of the debtor presented an alternative to the offer plan but that such liquidation, in the opinion of the trustee, would be somewhat less advantageous to him than acceptance of the offer but far more advantageous than its rejection. Nor was there a syllable to suggest that the trustee was one of a group of banks which had loaned large sums to the debtor's parent, Vaness, and to the debtor's subsidiary; that, under

the offer plan, those lending banks, including the trustee, might reap substantial advantages, which they would never obtain if the debtor were liquidated through proceedings then begun; and that, *inter alia*, those notes purchased under the offer plan which were not to be cancelled would be received by those banks as collateral.

The Opinion discusses (R. 90, 143 F. (2) 503, 521) the question whether State Statutes of Limitations are substantive or remedial rights, and concluded that they are *not substantive rights but remedial rights*, citing the decision of this Court in *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, which involved the State Statute of Limitations of New York.

That the State Statute of Limitations is *not a substantive right but a remedial right* was clearly held by the New York Court.

- (a) Under the New York decisions, the Statute of Limitations does not extinguish the cause of action but merely affects the remedy.**

The New York Courts have construed the Statute of Limitations as "remedial" in *House v. Garr*, 185 N. Y. 457. The New York Court of Appeals said (page 458):

"It must be borne in mind that the Statute of Limitations in this state never pays or discharges a debt, but only affects the remedy."

The same doctrine was announced in *Sharran v. Industrial Lines Co.*, 214 N. Y. 101, 110, and in *Foster v. Webster*, 14 N. Y. S. (2) 453.

(b) A statute which bars the remedy and does not extinguish the cause of action does not involve substantive rights.

There is a clear distinction between a statute which extinguishes a cause of action which is a substantive right and a statute which merely bars the remedy and does not involve a substantive right. The distinction was clearly recognized by this Court in *Walsh v. Moser*, 111 U. S. 3137, and is fully discussed by the Second Circuit in *Canadian Pac. Ry. Co. v. Johnston*, 61 Fed. 738, cited in *Home Insurance Co. v. Decker*, 281 U. S. 397, 409. The distinction was also recognized by the New York Courts (*Hill v. Superior*, 119 N. Y. 344; *Hutchinson v. Wood*, 192 N. Y. 375, 380).

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Petitioner concedes (p. 21) that it does not know of any decision by this Court since 1938 "holding the Statute of Limitations to be a part of substantive law" but that in various comparable situations this Court applied the standard of the *Erie* case in enforcing the Statute. Respondent does not contend that a Federal Court of equity may not apply the Statute but contends that it is not bound to apply it when it is inherently inequitable to do it.

Petitioner says (p. 22) that the clearest presentation of this point appears in *City Service Oil Co. v. Dunlap*, (398 U. S. 208) where this Court reversed the Fifth Circuit on the point that the "burden of proof" was substantive law and controlled by the rule in the *Erie* case. There, this Court did not hold that the *Erie* case applies to a remedy, but it concluded that the burden of proof in that case consisted of a "substantive right". The case is, therefore, clearly not in point.

III.

The Doctrine of Remedial Rights Invoked by the Court Below Rests Upon the Proper Construction of the Judiciary Act and Upon the Decisions of This Court and the Unanimous Voice of the Ten United States Circuit Courts of Appeals.

The question upon which certiorari was allowed is properly discussed by the petitioner under Point III and is discussed in the Opinion of the Circuit Court of Appeals at pages 88-104 of the Record (143 F. (2d) 503, 521-528). The Opinion, after assuming *arguendo* appellant's "interpretation" of the New York decisions, *rejected* the contention. The Opinion pointed out (R. 89) 143 F. (2) 509, 521) that twenty-four years prior to *Swift v. Tyson* in 1818 it was held in *Robinson v. Campbell*, 3 Wheat. 212, 222, that a construction which would adopt the State practice would "at once extinguish", in States where no Court of Chancery exists, the exercise of equitable jurisdiction.

(a) The Opinion is based on the uniform equity jurisdiction as established by Congress and defined by this Court.

The Opinion pointed out that this Court has repeatedly held that while Federal Courts in equity cases, where jurisdiction rests on diversity of citizenship, are bound by the State law as to "substantive rights" yet it need not follow State law with respect to equitable "remedial rights". In Note 28, the Opinion cites (R. 89, 143 F. (2), 503, 522) the authorities commencing with the year 1818 down to the year 1939, culminating in the decision of *Sprague v. Ticonic Bank*, 307 U. S. 161.

In commenting on *Eric v. Tompkins*, the Opinion stated that the *Eric* case disregarded the exception created by

Swift v. Tyson but it did not purport to, and did not in any way alter the wholly distinct doctrine relating to "equitable remedial rights" which does not rest on Section 34 of the Judiciary Act of 1889, being the so-called rules of the decision action, but on Section 11 of the Judicial Act (28 U.S.C.A. Sec. 41 (1)) covering equity powers of the Federal Courts. In Note 31, the Opinion cites (R. 90, 143 F. (2) 503, 522) three recent decisions of this Court, supporting these views. In Note 34, the Opinion quotes (p. 91, 143 F. (2) 503, 523) from *Guffey v. Smith*, 237 U.S. 101, the following:

"By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat. Sec 913, 917; *Norris v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430; *Dodge v. Tuleys*, 144 U. S. 451, 457; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204. As was said in the first of these cases, 'Wherever a case in equity may arise, and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable.'"

The Opinion quotes (R. 93, 143 F. (2) 503, 524) from Note 1 in *Russell v. Todd*, 309 U.S. 28 the following:

"But federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of *special equitable doctrines making it inequitable to apply the statute*. * * * Federal courts of equity have not considered themselves obligated to

apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant. (Citing, inter alia, the Kirby case.)"

In Note 1 in *Russell v. Todd*, *supra*, this Court also said, at Page 288:

"On the other hand, time has not been held to be no bar to an equitable suit for a trustee's accounting. *Michoud v. Girod*, 4 How. 503, 561; cf. *Badger v. Badger*, 2 Wall. 87, 92; *Southern Pacific Co. v. Bogart*, 250 U. S. 483. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant. *Michoud v. Girod*, *supra*, 561; *Meader v. Norton*, 11 Wall. 442; *Bailey v. Glover*, 21 Wall. 342, 348; *Kirby v. Lake Shore & Michigan Southern R. Co.*, 120 U. S. 130; *Rugan v. Sabin*, 53 F. 415, 420; *Stevens v. Grand Central Mining Co.*, 133 F. 28; *Johnson v. White*, 39 F. 2d 793." (Emphasis ours.)

The cases there cited are conclusive on this point. In *Michoud, et al. v. Girod, et al.*, 45 U. S. 503, the court said (p. 560):

"In general, length of time is no bar to a trust clearly established to have once existed; and when fraud is imputed and proved, length of time ought not to exclude relief. *Perrost v. Gratz*, 6 Wheat. 481. * * * There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered, or becomes known to the party whose rights are affected by it." (Emphasis supplied.)

In *Bailey v. Glover*, 21 Wall. (p. 342) cited there, the court referred to the conflict of authorities on the point whether state statutes of limitations apply in equity and after pointing out that *by specific language of the particular statute of the state, the statute was made applicable to equity cases*, the court did not let the statute stand in the way, and held that equity may *disregard it, saying* (p. 348):

"But we are of the opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitations. *They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.* And we see no reason why this principle should not be applicable to suits tried on the common-law side of the court's calendar as to those on the equity side." (Emphasis ours.)

The decisions in the *Erie* case was construed by this Court in an Opinion rendered by Mr. Justice Black in *Garrett v. Moore-McCormick Co.*, 317 U. S. 239, as applying to "substantive rights only." There, the Court said (Page 245):

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago, we sought to achieve this result with re-

* Cited with approval by the New York Court in *Bodds v. McGowan*, 229 App. Div. 273 (1940).

...spect to enforcement in the Federal Courts of rights created or governed by State law, referring to the decision in *Erie v. Tompkins*, 304 U. S. 64. There, this Court also held that the admiralty law must be uniform in all of the states because it is founded on Federal law. The same reasoning is applicable to equity jurisdiction which is founded on Federal law by virtue of Section 11 of the Jurisdictional Code, now 28 U. S. C. A. 41 (1) as held in this Opinion (Rec. 90) and the benefit of the Federal Statute cannot be thwarted by state law and in "such a case," the decision is "not controlled" by *Erie v. Tompkins*. (*Sola Elec. Co. v. Jefferson Elec. Co.*, 347 U. S. 153, 176.)

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The assertion (p. 24) that *Kirby v. Lake Shore, et al. Ry. Co.*, 120 U. S. 130 "was overruled," is not supported by any decision and is refuted by the recent decisions of this Court cited above.

The suggestion that the Court below "misunderstood" the decision in *Russell vs. Todd*, is refuted by the decision of almost every Circuit where the construction of the decision in *Russell vs. Todd* was involved.

(b) Almost all of the Federal Circuit Courts of Appeals have adopted the views of the Second Circuit that the Federal equity jurisdiction is not governed by state law, and even the Fifth Circuit, which previously expressed a different view, is now in accord with the decision in the instant case.

The question whether a Federal equity court, sitting in a diversity case, is bound by Statutes of Limitations, was presented practically to all Circuit Courts of Appeal, and they are now unanimous and in accord with the decision in the instant case. We will now refer to the decisions of the various Circuits.

FIRST CIRCUIT: The question was not presented to the First Circuit as to the meaning of *Russell vs. Todd*, but the rule that a Court of equity is not bound by the State Statutes of Limitations was followed there (*Lopez v. Gauthier*, 41 F. (2d) 914, 916.)

SECOND CIRCUIT: Prior to the decision in the instant case, the Second Circuit adopted the same view, that Federal Courts in diversity cases are not bound by State Statutes or decisions in purely equitable cases. (*Richardson v. Comm. of Int. Rev.*, 126 F. (2d) 562, 567.)

THIRD CIRCUIT: The Third Circuit adopted this view in *Black & Yates v. Mahogany Assn.*, 129 F. (2d) 227, and the decision was followed in *Orth v. Transit Investment Corp.*, 132 F. (2d) 938, 945, and in *McClasky v. Harbison-Walker Ref. Co.*, 138 F. (2d) 498, 496.

In *Black & Yates v. Mahogany Assn.*, 129 F. (2d) 227, the 3rd Circuit Court of Appeals said (p. 233):

In *Sprague v. Ticonic Bank*, 307 U. S. 161, 164, 165, 59 S. Ct. 777, 779, 83 L. Ed. 1184, the Supreme Court by Mr. Justice Frankfurter, held, following earlier decisions, including *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260, that "the suits 'in equity' of which these courts (of federal equity jurisdiction) were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress, *e. g.*, *Michaelson v. United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451." We think that this must be deemed to be an indication from the Supreme Court that in so far as equitable remedies are concerned federal courts are to grant them in accordance with their own rules which have been developed out of the English Chancery practice. The words of Mr. Justice Frankfurter in the *Ticonic Bank* case are a plain indication that the rule runs

ciated in *Payne v. Hook*, *supra*, 7 Wall. page 430, 19 L. E. 260, "The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; *is subject to neither limitation or restraint by State legislation; and is uniform throughout the different States of the Union.*" is the law so far at least as the granting of equitable remedies is concerned. The rule of *Erie R. Co. v. Tompkins* being determinative of *substantive rights*, there is still preserved to the federal courts a uniform basis for granting *equitable remedies* in cases in which substantive rights have arisen under state law. (Emphasis supplied.)

FOURTH CIRCUIT: The Fourth Circuit adopted the same view in *Committee for Holders, etc. v. Kent*, 143 F. (2d) 684. There, it said:

"And suit might be brought in a Federal Court of equity, where, to say the least, it is extremely doubtful that the statute would be followed."

referring to *Russell v. Fodd*, 309 U. S. 280.

FIFTH CIRCUIT: The Fifth Circuit originally held in *Walt v. American Surety Co.*, 88 Fed. (2d) 171, 173, that where a cause of action in a Federal Court is purely equitable, state Statutes of Limitations *apply only by analogy* but that they are *not binding* on the Federal Courts. It *receded* from this position in *Roos v. Texas*, 126 F. (2d) 767. This was the *only* case which probably was the reason for the granting of certiorari because it was not in accord with the other Circuits. In a *recent* decision decided by the Fifth Circuit, it has changed its views, for it held in *Commercial Nat'l Bank v. Parsons*, 144 F. (2d) 231, 241, that the difference in substance "in Federal jurisdictional power between law and equity is embedded in the Constitution and it remains unaltered," referring to Article III of Section 2, Paragraph 1, of the Constitution of the United States and it adhered to the "established equitable juris-

diction of the Federal Courts" which is governed by the maxims and principles of equity.

SIXTH CIRCUIT: The Sixth Circuit has expressly adopted the views expressed in the instant case in *Fraser v. U. S.*, 143 F. (2d) 139. There, it said (Page 144):

"The case, however, arises in a federal court of equity jurisdiction, and the problem presently discussed involves remedial rights as distinguished from substantive rights, and equitable powers which, having their source in the Constitution, were conferred upon the courts of the United States by Sec. 11 of the Judiciary Act, 1 Stat. 78, 28 U. S. C. A. Sec. 41. So we have recently been reminded in *York v. Guaranty Trust Co. of New York*, 2 Cir. 143 F. 2d 503, 523, that the Supreme Court in *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, 7 S. Ct. 430, 30 L. Ed. 569, declared, 'the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.' This judgment, in both of the cited cases, involved state statutes of limitation. If, however, the rationalization in the *York* case, *supra*, supported as it is by copious annotation, is sound, and the rule of the *Kirby* case prevails, notwithstanding *Esch R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, we must conclude that a federal equity court is not necessarily bound to apply a state statute giving added breadth to an evidentiary rule of privilege, when clearly it is inequitable to do so." (Emphasis ours.)

SEVENTH CIRCUIT: The Seventh Circuit has followed in line with the other Circuits (*Philco Corp. v. Phillip Mfg. Co.*, 133 F. (2d) 663). At Page 665, the Court said:

"However, it was pointed out in *Russell v. Todd*, 309 U. S. 280, 287, 60 S. Ct. 527, 531, 84 L. Ed. 754, that Rules of Decision Act applies only to trials at common law, not to suits in equity."

EIGHTH CIRCUIT: The Eighth Circuit has adopted this view in a long line of decisions (*Schindler v. Spochermer*, 16 F. (2d) 45, 49; *Johnson v. White*, 39 F. (2d) 793, 798; *Johnson v. Onsted*, 64 F. (2d) 316, 323; *Wingart v. Rockwood*, 69 F. (2d) 326; *First Trust and Sav. Bank v. Iowa Wis. Bridge Co.*, 98 F. (2d) 416 (Cert. Denied; 305 U. S. 650)).

In the *Wingart* case, the Eighth Circuit said (Page 237):

"Federal Courts sitting in equity are not bound by state Statutes of Limitations, although they are usually guided by them. If unusual conditions or extraordinary circumstances, however, make it inequitable to forbid the maintenance of a suit after a longer period than that fixed by the Statute, the Chancellor will not be bound by Statute but will determine the case in accordance with the equities."

citing a long line of decisions.

NINTH CIRCUIT: The Ninth Circuit construed the decision in *Russell v. Todd* in accord with the decision in this case and held that Federal Courts are not barred by state Statutes of Limitations (*Gillans v. Shell Co.*, 86 F. (2d) 600, 607-8). *Robinson v. Linfield College*, 136 F. (2d) 805, 807), certiorari denied (320 U. S. 700).

TENTH CIRCUIT: The Tenth Circuit has adopted the same views as expressed in this Opinion in *Hochstetler v. Crooks*, 144 F. (2d) 655. At Page 670, the Court said:

"A Court of equity is not bound by the Statute of Limitations, although it will ordinarily give effect thereto in many situations by analogy to the Statute of Limitations."

The Court cited in Note 2 many decisions and authorities.

(c) **All Text Writers and commentators are in accord with the views expressed in this Opinion.**

In a comment by Professor Walter Wheeler Cook in 36 Ill. Law Rev. 493, on the effect of the decision in the Erie case, he concluded that the decision does not affect equity jurisdiction which is uniform through the States.

In an article in 9 Univ. of Chi. Law Rev. 308, the writer refers to the case of *Neer's v. Scott*, 13 How. 268 (1851), decided 9 years after *Swift v. Tyson*, and he points out that in that case, the Court did not refer to the Swift case and concluded that Federal Courts are *independent* of State decisions in matters depending on the principles of "general equity jurisprudence." He refers to the case of *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202, which is discussed in the Opinion (Rec. 90) and which is the *only* case upon which the Petitioner relies and says that that case does not establish the proposition as far as "purely" equitable issues are concerned since the particular question involved was the construction of an insurance contract, which might well have been determined in a suit at law.

In 115 A. L. R. 1007, the author points out that the "Practice Conformity Act, (§ 914, 28 U. S. C. A. § 724)" provides that: "The practice, pleadings and forms and modes of proceeding in civil cases, **other than in equity** and admiralty causes, in the District Courts, shall conform, as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of record of the state within which such District Courts are held," while the State Law Conformity Act (§ 721, 28 U. S. C. A. § 725) provides: "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide,

shall be regarded as rules of decision in trials **at common law**, in the courts of the United States, in cases where they apply. The author then points out that the former expressly *excludes* "equity cases" while the latter is *confined* to cases "at common law," and because of the *exclusion* of equity cases from the Practice Conformity Act, it had been *generally held* that State laws may neither diminish nor enlarge Federal equity jurisdiction. The author says (page 1008) that even in states where the distinction between actions at law and suits in equity was abolished, and which authorized the blending of legal and equitable matters, state Court decisions applicable to actions at common law are *inapplicable to actions in equity* in the Federal Courts sitting in such states, citing many authorities. The same views are expressed in 19 Am. Jur. Equity, Sections 496, 497, and 30 U. S. Equity, Sec. 116.

A. Theory of Court Below

In their analysis of the theory of the Court below (p. 24), counsel refer to the "majority" Opinion, indicating thereby that the dissenting Opinion was not in accord with the majority that the rule in *Eric vs. Tompkins* does not apply in equity to "remedial rights." A reference to the dissenting Opinion of Mr. Justice Augustus N. Hand (1, 106, 107, 143 F. (2) 503, 531) indicates that the Court was *unanimous* in its view that under the decision in *Russell vs. Todd*, Courts of equity are *not bound* by state Statutes of Limitations. They were in *disagreement* on the question whether this was an *extraordinary* case in which the Statute *shall* be disregarded.

B. Analysis of Authorities on Federal Equity Jurisdiction.

28

Petitioner urges (p. ~~27~~) that an analysis of authorities relating to Federal equity jurisdiction shows that there is a distinction between (1) procedure, and (2), substance, and that as to (1) Federal Courts are *not* bound by State law while as to (2), they *are* bound, and that Statutes of Limitations are considered matters of "substance" and, therefore, such Statutes are binding on the Federal Courts. This classification is based on petitioner's *bare* statement, *without any authorities in support thereof*. The decisions of this Court cited in the Opinion (R. 90), refute the contention. The decision in *Cuffey v. Smith*, 237 U. S. 101, cited in the Opinion, refers to "remedies" as well as "modes of proceedings". That Statutes of Limitations are classified as "remedial rights" and not "substantive rights" appears clearly from *Benedict v. New York*, 250 U. S. 321.

1. *Federal equity jurisdiction conceived as the Court's right to hear the case are not involved here.*

The question as to the power of a Court to hear a case is not confined to Equity Courts and is applicable to all Courts. A Court that is without power to hear a case is without jurisdiction of the subject matter, and the discussion of this point in the Petition (p. 28) is unnecessary in the instant case.

2. *Federal equity jurisdiction conceived as affecting the manner of hearing as to procedure only is not involved here.*

While the authorities cited on this point in Petitioner's Brief (pp. 31-35) relate to matters of procedure, these cases relied as a basis for their decision, on the distinction between "remedial rights" and "substantive rights".

Petitioner *concedes* (p. 34) that in *Pusty & Jones Co. v. Hanssen*, 261 U. S. 491, 497-9, the phrase "remedial rights" as distinct from "substantive rights" was used, and that this language was also used in *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377, 382.

3. *Federal equity jurisdiction concerned as embracing matters determinative of the issue.*

The cases listed in petitioner's Brief (pp. 36-38) as determinative of the question involved *against* the petitioner were *not* "overruled" by *Eric v. Tompkins*, as asserted. On the contrary, they were cited and approved by this Court in *Russell v. Todd*. Such was the construction by almost *every* Circuit where the question was involved, as shown above.

4. *Summary with respect to Foregoing Decisions.*

It is evident from the foregoing decisions that:

(a) That this Court has consistently distinguished between "remedial rights" and "substantive rights". The quotation (p. 40) from *Henrietta Mills v. Rutherford County*, 281 U. S. 121, expressly distinguishes between "substantive" and "remedial" rights and distinguishes between a state statute of a mere "remedial character" and a state statute which extinguishes the cause of action and which is deemed substantive. The distinction between a state Statute of Limitations which is of a "substantive nature" as where the cause of action is *extinguished* and between a Statute of Limitations which is *remedial* in character and where the cause of action is *not extinguished*, were expressly made by this Court in *Home Ins. Co. v. Dicker*, 281 U. S. 397, 409, *supra*.

(b). The question what lapse of time shall be deemed in Federal equity suits to be conclusive as against rights asserted in equity has never been considered to be a substantive question as asserted by the petitioner (p. 41).

(c) Prior to 1938, the decisions are *overwhelming* that Federal Courts were *not* bound by States Statutes of Limitations and while they *may by analogy* apply such Statutes, they were not bound to do so, if it were against equity and good conscience.

(d) The decisions of this Court prior to 1938 were *not* overruled by *Eric v. Tompkins*, as asserted by the petitioner (p. 42) but were reiterated in *Russell v. Todd* and followed by almost every Circuit.

**C. Kirby v. Lake Shore & Michigan Southern Railroad,
120 U. S. 130 (1887) Is Not Overruled.**

The Kirby case was cited in *Russell v. Todd*. There, this Court said:

"While the courts of the Union are required by the statutes creating them to accept as rules of decision, *in trials at common law*, the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, *their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit*. In *United States v. Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said, that, as *the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states*. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts in the United States (p. 13) when he observed that 'the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws.' So in *Payne v. Hook*, 7 Wall. 425, 430, it was said: 'We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different

states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. *If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equity.* The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possesses, *is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union.*

In applying the law as to the New York Statute of Limitations, this Court said (p. 138):

"In view of these authorities, it is clear that the statutes of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. *But these general rules must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.* It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud." (Emphasis ours.)

The contention (p. ⁴⁸~~47~~) that the holding in the *Kirby* case that the Federal Equity Courts in diversity cases are not bound by the New York Statutes of Limitations was mere "dictum" is devoid of merit. The decision was cited on this point in *Exploration Co. v. U. S.*, 247 U. S. 448. It was cited in *Benedict v. City of New York*, 250 N. Y. 321.

The statement (p. ³⁰~~48~~) in Note ⁴⁶~~47~~ that the *Kirby* case has not been cited since *Eric v. Tompkins* in any Circuit Court of Appeals is *refuted* by the decision of the Sixth Circuit in *Fraser v. United States*, 143 F. (2d) 139, 144, *supra*.

D. Russell v. Todd, 309 U. S. 280 Is in Accord With the Opinion.

We have shown above that almost every Circuit is in accord with the interpretation of the decision in the instant case.

Counsel cite *Roos v. Texas Co.*, 126 F. (2) 567, decided by the Fifth Circuit. We have shown above that the Fifth Circuit is *now in accord* with the decision in the instant case by its subsequent decision in *Commercial Nat'l. Bank v. Parsons*, 144 F. (2) 231. The *Roos* case was also *distinguished* in the Opinion (R. 99).

The decision by the Sixth Circuit in *Sanders v. Louisville R. Co.*, 144 F. (2) 485, which petitioner cites (p. 51) is *in accord* with the decision in the instant case. It holds that "generally", Equity Courts will follow by "analogy" the Statute of Limitations of State Courts, but that they are not bound to do. We have also shown above that the Sixth Circuit *expressly approved* the Opinion in *York v. Guaranty Trust Co.* in its decision in *Fraser v. United States*, 143 F. (2) 139, 144.

In the decision of the Seventh Circuit in *Ganchoff v. Home Insurance Loan Corp.*, 142 F. (2) 677, the question

whether a Court of Equity must enforce State Statutes of Limitations when they are not inherently inequitable was not involved. The *contrary* was held by the Seventh Circuit in *Philco Corp. v. Phillip Mfg. Co.*, 133 F. (2) 663, 665.

The earlier decision in *Schram v. Poole*, 97 F. (2) 566 by the Ninth Circuit, on which counsel rely, is, of course, controlled by its later decision in *Robinson v. Linfield College*, 136 F. (2) 805.

The assertion, therefore that the six Circuits have *approved* or have acted on the interpretation of *Russell v. Todd* as contended by the petitioner is *without any foundation*.

Conclusion.

The question whether the New York Statute of Limitations is a bar to this action was excluded by this Court when it limited the allowance of certiorari to the question:

In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State Statute of Limitations held to govern like cases by the State courts?

We have shown above that this question was answered in the negative by almost every Circuit in construing the decision of this Court in *Russell v. Todd*.

The Order and Judgment of the United States Circuit Court of Appeals for the Second Circuit should therefore be affirmed.

Respectfully submitted.

MEYER ABRAMS,

134 North La Salle Street,
Chicago, Illinois.

BENNETT I. SCHLESSEL,

1450 Broadway,
New York, N. Y.

Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS;

134 North La Salle Street,

Chicago, Illinois.

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CHARLES ELMORE DROPLEY

IN THE
Supreme Court of the United States
October Term, 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

against

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

MEYER ABRAMS,
134 North La Salle Street,
Chicago, Illinois.

BENNETT I. SCHLESSEL,
1450 Broadway,
New York, N. Y.,
Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street,
Chicago, Illinois;
Of Counsel.

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IN THE
Supreme Court of the United States
October Term, 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

against

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

Statement.

At the conclusion of the oral argument, Respondent asked leave to file an additional brief because Petitioner's Brief was served on him about four days prior to the oral argument, leaving only two or three days to file Respondent's Brief. The references to the pages of Petitioner's Brief do not in some instances correspond because the paging in Petitioner's Brief were changed after the printing of Respondent's Brief. Many authorities were cited at the oral argument which were not included in Respondent's Brief. For these reasons Respondent obtained leave to file this supplemental Brief.

POINT I.

The complaint states a cause of action which is peculiarly and exclusively within the jurisdiction of equity. No adequate remedy at law is available to afford Respondent the relief necessary to protect her rights and the rights of the class she represents.

There was a suggestion made on the oral argument that the decision of this case might depend upon a determination as to whether the relief requested could be obtained concurrently at law and in equity or whether, on the contrary, the relief comprehended by the bill placed the case within the exclusive jurisdiction of equity.

We shall show, hereafter, that this case is within the exclusive jurisdiction of equity. *In limine*, we desire to dispose of two matters which we do not believe are involved here in any way at all.

We are not discussing a case where the remedy sought is exclusively legal and, in order to avoid the statute of limitations, the complainant phrases his bill along equitable lines and brings it in equity. Obviously, in such a case, no serious argument could be advanced to deny the application of the statute of limitations under the Rules of Decision Act. Indeed, no litigant could deprive his adversary of his constitutional right to a trial by jury merely by casting his complaint along equitable lines. [*Judicial Code* § 267; 28 U. S. C. § 384; *Morgan v. Beloit*, 7 Wall. 613, 618 (1868); see: *DiGiovanni v. Camden Fire Insurance Assn.*, 296 U. S. 64, 69, *et passim* (1935); Cf. *Note: Effect of the Existence of an Adequate Remedy at Law in the State Courts on Federal Equity Jurisdiction*, 49 Harv. Law Rev. 950 (1936).]

That problem is not presented here. Respondent is suing a trustee on behalf of a class of cestuys for breach of

trust and seeks to hold that trustee accountable for that breach. This is *not* a law action dressed up to look like an equity suit. This is a case which, both historically and analytically, has always been within the exclusive jurisdiction of equity. [*Oetricks v. Spain*, 15 Wall. 211 (1872); *Hunter v. U. S.*, 5 Pet. 172 (1834); *Coke on Littleton*, § 272-b; 32 *Halsbury, Laws of England* (2nd ed.) p. 305 § 532; 2 *Scott on Trusts*, §§ 197, 197.1, 197.2, 198, 198.1, 198.3; 4 *Bogert on Trusts*, § 871; 2 *Beach on Trust and Trustees* (1897) § 750; *Lewin on Trusts* (14th ed. 1939) p. 13; 2 *Perry on Trusts* (7th ed. 1929) ch. 27; Cf. *Scott, Participation in a Breach of Trust*, Reprinted in *Selected Essays on the Law of Trusts* (1940) p. 454, *et passim*.]

Nor is this a case merely of concurrent jurisdiction in the sense that Respondent is seeking only money damages. In this case Respondent desires two kinds of relief and the distinction between the two must be emphasized throughout. In the first place, Respondent seeks relief in a purely equitable cause for reparation of breach of trust *after a determination that there was a breach of trust*. In addition, Respondent requests that the Court require Petitioner to account for misappropriation of property and profits. But over and above this relief (which in so far as reparation is requested, may ultimately result in money damages), Respondent invokes the aid of the chancellor afforded only in equity—to relieve her from the consequences of Petitioner's inequitable conduct in the concealment of the wrongs complained of, for a sufficient period of time to enable it to plead the statute of limitations.

But assuming *arguendo*, that except for the special relief requested in chancery to relieve Respondent from the consequences of Petitioner's inequitable conduct the action was merely one for money damages, no argument could be raised that there was a concurrent remedy at law, for law could never grant relief against inequitable conduct.

A hypothetical historical case will illustrate this point. Suppose that in 1789 Respondent were suing on a note *at law* and Petitioner pleaded the statute of limitations. Let us assume, further, that there were equitable grounds which would appeal to the chancellor, *i. e.*, such conduct by Petitioner, as concealment, fraud, etc., which would make it inequitable to permit Petitioner to plead the statute of limitations. In such a case, Respondent could, by a bill in equity, seek to enjoin Petitioner from pleading the statute of limitations as a defense in the action at law.¹ That such relief was always granted historically in a proper case cannot be doubted; *that such relief will be granted today in New York cannot be disputed.*

Dodds v. McCulgan, 229 App. Div. 273 (1st Dept. 1930).

Although historically the action would *first* start at law on the note and, *after* the defense of the statute of limitations was pleaded, Respondent would bring a separate bill in equity to be relieved of that defense,² today in New York

¹ Langdell in his *Brief Survey of Equity Jurisdiction* (2d ed., 1908) says as to this (p. 258), "So equity will impose upon a defendant to an action or suit an obligation not to use a defense which will prevent a trial of the case upon its merits, or by which the course of justice will otherwise be obstructed". Elsewhere on the same page as illustrating this principle he says: "Thus if a debtor fraudulently procure from his creditor a release of the debt . . . equity will impose upon him an obligation not to use the release as a defense to an action or suit by the creditor to recover the debt." The learned author could as well have cited our illustration for the principle asserted, *viz.*, equity's injunction against the defense of the statute of limitations where its pleading would not be "consonant with equitable principles."

² The practice was so customary that the Court of Chancery in New York had elaborate rules on the subject. See: *Rules and Orders of the Court of Chancery of the State of New York as Revised and Established by Chancellor Walworth, etc.* (N. Y. 1839) Rules 31 *et passim* (particularly Rule 33); 1 *Hoffman's Chancery Practice* (1835) ch. 2, Section VII (p. 76 *et seq.*); ch. 3, Section XV (p. 166 *et seq.*); ch. 9, Section VII (p. 334 *et seq.*); ch. 10, Section V (p. 357 *et seq.*).

(and presumably under the Federal Rules) the same relief may be obtained in one suit.¹

"Equity in a proper case will thwart such a fraud; it may accomplish the result by enjoining a party from interposing the statute² as a defense and decreeing recovery upon the debt. Here, the relief sought is merely a judgment for the moneys due; the judgment reads as though it were rendered in a common-law action. Of course, plaintiff might have again sued on the notes and when met with the defense of the statute have instituted a suit for an injunction and as an incident of equitable jurisdiction had judgment in the amount of the debt. That this circuitous method was not followed is no valid objection; it was not necessary to sue again at law, because the defendant had already relied with success upon that plea and plaintiff was remediless at law. In our view, equity had jurisdiction to relieve against the fraudulent and unjust result and to enter the right-

¹ See: *Bosley v. National Machine Co.*, 123 N. Y. 550 (1889); *Exploration Co. v. United States*, 247 U. S. 435 (1918); *Lightfoot v. Davis*, 198 N. Y. 261 (1910). Thus, historically, the Kirby case fits into a well recognized pattern. In *Exploration Co. v. U. S.*, *supra*, this Court in construing a statute of limitations absolute on its face, held it subject to the implied exception that it did not begin to run until the discovery of the fraud, saying that this "was the undisputed doctrine of courts of equity" [cf. *Gibbs v. Guild*, 9 Q. B. D. 59 (1882)]. This equitable doctrine will thus be applied *affirmatively* to enjoin the defense of limitations; it will be used *defensively* to imply equitable exceptions into a statute otherwise absolute on its face; it will even (as in the *Lightfoot* case) imply an exception where the fraud and theft is outrageous, that the statute does not begin to run until the discovery of the identity of the wrongdoer. The inequitable conduct which is the source of complaint in our case is merely a twentieth-century variation. Today's chancellor deals with corporate fiduciaries whose inequitable conduct does not stop at state lines. The policy which activated the Chancellor in the eighteenth century has not changed; the context within which the problem arises has merely assumed a different form—with national implications. For a fairly recent illustration of this point see the situation described in *Alexander v. Hillman*, 296 U. S. 222 (1935).

² The court was referring to the statute of limitations.

ful judgment upon the debt which but for decedent's devious conduct would long ago have been procured."

Dodds v. McColgan, supra, at page 277.

Counsel for Petitioner argued that Respondent had a remedy at law concurrent with that in equity; that Respondent was seeking simple money damages; and concluded that such relief was available at law. In the course of this argument counsel asserted that the concurrence of the remedy in law with that in equity was proved by the fact that Respondent's remedy was the same on the law as on the equity side. *We do not agree.* We shall show that the complaint seeks relief which can be obtained only in equity.

The complaint, in addition to a general prayer for such relief as equity may deem justified in the premises, seeks three categories of relief:

(1) it asks for a determination that Petitioner was guilty of a breach of trust and is liable to the class represented by Respondent for such breach of its trust duties;

(2) it asks for a finding that there was participation by Petitioner with the trustor-obligor in a fraud and a misappropriation by Petitioner of a part of the underlying collateral to its own use;

(3) it seeks, *in the alternative*, that Petitioner be held liable, to the extent of its profits, in its diversion of the segregated assets in such amount as may be disclosed by a proper accounting.

We do not believe that the Court will be misled as to the nature of the case merely by the assertion that ultimately all Petitioner will have to do is to pay money.

In limine it is requested that there be a *determination* that Petitioner was guilty of a breach of trust. Such relief

is essential to Respondent and her class. It can be afforded only in equity where trusts are subject to the special regard of the chancellor. "If these trusts are fraudulent, the lessors of the plaintiff have a plain and ample remedy in the Court of Chancery, which has the exclusive jurisdiction of trusts and trust estates." [TANEY, C. J. in *Lessee of Smith v. McCann*, 24 How. 398, 407 (1860).]

The authorities universally assert that an action for breach of trust, such as the one here involved, lies exclusively within the jurisdiction of equity. Equity alone has sole and exclusive jurisdiction to determine the existence of a breach of trust. Obviously this cause could not have been brought at law to recover money damages, for the existence of the obligation, if there be one, follows only from a prior determination which can be made only in equity, *i. e.*, that there was a breach of trust. After the determination of that breach, and by forms and proceedings peculiar to equity, the amount of reparation which the Petitioner must make is then determined. Only then can it be said that Petitioner must respond in money damages. That, as it clearly appears, is the end result of remedies afforded only and exclusively in equity. Thus *Halsbury*¹ asserts:

"A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction."

The *Re-statement of the Law on Trusts* summarizes the matter as follows:

"§ 197. *The Nature of Remedies of Beneficiary.* Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable."

¹ 33 Halsbury, *Laws of England* (2d ed.), p. 305, § 532.

“§ 198. *Legal Remedies of Beneficiary.* (1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.”

“Comment: * * * An action at law cannot be maintained against a trustee for damages for breach of trust as distinguished from an indebtedness arising out of a breach of trust. Thus if the trustee negligently injures or destroys the subject matter of the trust, other than money, he is not liable in an action at law.”

“§ 199. *Equitable Remedies of Beneficiary.* The beneficiary of a trust can maintain a suit * * * (c) to compel the trustee to redress a breach of trust; * * *

“§ 201. A breach of trust is a violation by the trustee of a duty which as trustee he owes to the beneficiary.”

This was recognized from the very beginning. *Coke on Littleton* asserts [§ 272.(b)]:

“* * * So, as *cestui qui use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust, for which he had no remedie by the common law, but for breach of trust, his remedie was only by *subpoena* in chancerie; * * *

An authority on the law of trusts entitled to the greatest respect so lays down the rule. Thus Scott¹ says:

“§ 197. Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity. * * *

“§ 197.1 * * * the modern courts have not permitted the beneficiary of a trust to maintain an action at law for tort against the trustee for breach of trust. * * *

¹ 2 Scott on Trusts (1939), § 197, et seq.

“§ 197.2 * * * the trustee is not liable in an action at law for breach of contract merely because he signs an instrument accepting the trust * * *. It can be safely said today that a trustee is not liable in an action at law for breach of contract unless he has undertaken to do something other than merely to administer the trust, and the mere fact that he expressly undertakes to perform the trust is not a sufficient ground for maintaining an action at law against him for breach of contract if he commits a breach of trust.

“There is, indeed, an important practical reason why an action for breach of contract should not be maintainable against the trustee. To allow such an action would mean that a court of law sitting with a jury would be called upon to decide complicated questions involving the conduct of the trustee in the administration of the trust, whereas such questions can be properly dealt with only in a court of equity.

“§ 198. Although the remedies of the beneficiary against the trustee are ordinarily exclusively by a proceeding in equity, there are certain situations in which a remedy at law has been permitted. In these situations the liability of the trustee is definite and clear and no accounting is necessary to establish it. The first situation includes cases where the trustee is under an immediate and unconditional duty to pay money to the beneficiary. The second situation includes cases in which the trustee is under a duty immediately and unconditionally to transfer a chattel to the beneficiary. In other situations it is held by the weight of authority that the remedies of the beneficiary are exclusively equitable. As we have seen, the trustee is not liable in an action at law for breach of contract for his failure to perform his duties under the trust.

“§ 198.1. On the other hand, where the trustee is not under an immediate and unconditional duty to pay money to the beneficiary, the beneficiary cannot maintain an action at law against him. * * *

"§ 199.3. If the trustee has committed a breach of trust the beneficiaries can maintain a suit in equity to compel him to redress the breach of trust, either by making specific reparation or by the payment of money or otherwise. * * *"

Bogert,¹ another learned authority in the law of trusts entitled to great respect, asserts the rule as follows:

"§ 871. Equity has generally been held to have exclusive jurisdiction to aid the *cestui* likewise where the basis of the suit is the negligence of the trustee in managing the trust property * * * or a breach of trust in neglecting to collect and apply the trust assets according to the trust terms * * * or where the foundation is the conversion by the trustee of the trust property and its proceeds."

In *Beach on Trusts*,² the rule is laid down as follows:

"It is the rule, that all actions for the establishment of the fiduciary relation, for the execution and enforcement of trust, or of the obligations arising out of the trust relation; and for the investigation and adjustment of differences between the parties to a trust, are within the exclusive jurisdiction of equity."

This Court has time and again recognized the rule contained in the foregoing authorities.

In *Oelrichs v. Spain*, 15 Wall. 211 (1872), a bill was successfully brought in equity to recover money damages arising under injunction bonds. It was asserted on appeal that there was a complete and adequate remedy at law. In overruling this argument, the Court said (at p. 227):

"It has been insisted by the counsel for the appellants that there is a complete remedy at law, and that the bill must, therefore, be dismissed. Such

¹ 4 *Bogert on Trusts and Trustees* (1935), § 871-*et seq.*

² Cited at p. 3, *supra*.

must be the consequence if the objection is well taken. In the jurisprudence of the United States this objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel.

"The 16th section of the Judiciary Act of 1789 provides, 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;' but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity.'

"Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury.

"But this principle has no application to the case before us. Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. *Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity.*" (Emphasis ours.)

This Court has further held in *Morgan v. Beloit*, 7 Wall. 613, 619 (1868) that:

"the jurisdiction of a court of equity to interfere in all cases involving" trusts "is too clear to require any citation of authorities. It rests upon an elementary principle of equity jurisprudence."

That was a suit in equity to require the City and Town of Beloit to pay their respective portions of their liability for certain bonds pursuant to a statute. In answering the objection that an adequate remedy at law existed, the Court said, elsewhere in its opinion (at p. 618):

"The statute is conclusive as to a liability to be enforced in some form of procedure. The only question before us is, whether there is a remedy in equity. It may be, as suggested by the counsel for the appellant that an action would lie upon the statute. It is also possible that a proper case for a writ of *mandamus* might be made. But these inquiries are only material as bearing upon the question whether there is an adequate remedy at law. If so, a suit in equity cannot be maintained. To have this effect, the remedy at law, 'must be as plain, adequate, and complete', and 'as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity.' When the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial by jury. The objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. The provision upon the subject in the sixteenth section of the Judiciary Act of 1789, was only declaratory of the pre-existing rule."

"In the case before us the adjustment of the amount to be paid by the city, will depend upon accounts and computations founded upon the proper assessment rolls. In order to bind the town, it is necessary that it should be made a party. This cannot be done in proceedings at law. If the town should be compelled to pay the entire amount, the right is given by the statute to recover back the proportion for which the city is liable. This would involve circuity of litigation. The remedy at law is, therefore, neither plain nor adequate."

In *Manhattan Bank v. Walker*, 130 U. S. 267 (1889); plaintiff sued in equity to recover securities, *or their value*, delivered by her agent to the Bank for safe keeping and misappropriated by the Bank. The Court held the Bank liable for money damages, but said (p. 271):

“The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust in regard to a special deposit. * * *”

Similarly, in *Hunter v. U. S.*, 5 Pet. 172 (1831), the United States brought a bill in equity against Hunter as trustee of Smith to recover out of the trust moneys a sum due to it from Smith. It was objected (p. 188):

“that there was full and ample relief to be obtained at law; and consequently, chancery cannot take jurisdiction of the case.”

In sustaining a decree in favor of the United States, the Court said (p. 188):

“How is this liability to be enforced? What process at law would be adequate to give the relief prayed for in the bill?

“It is the peculiar province of equity, to compel the execution of trusts. In this case, it is conceived, the proceeding at law would not be adequate. The fund to be reached was in the hands of a trustee; and it was important that it should not pass from his hands to the creditors of Smith.

“The amount of the claim against the Crarys might be disputed; the trustee was entitled to his commissions, and other difficulties were likely to arise, in the progress of the investigation, which could only be fully adjusted at the instance of the United States, by a court of chancery. No doubt

exists, therefore, that a resort to the equity jurisdiction of the circuit court in this case was proper and necessary."

But the request that there be a *determination* that Petitioner was guilty of a breach of trust—thus shown to justify in and of itself the special and exclusive jurisdiction of equity—is not the only ground on which Respondent rests its invocation of the protection and help of equity. The bill of complaint shows that Petitioner participated with the trustor-obligor in a fraud and misappropriation of part of the underlying collateral which it applied to its own use. The need for the special and flexible powers and forms of equity is thereby made apparent. It may become necessary to reach and trace the funds so misapplied; this only equity can do. It may be that liens on new property created by or derived from the misappropriation should be granted and enforced; equity alone can do this. Moreover, Respondent represents a numerous class. Doubtless there will be many conflicting rights and equities to be investigated, apportioned and satisfied; equity alone affords the necessary remedy [cf. *Alexander v. Hillman*, 296 U. S. 222 (1935)].

Thus, the jurisdiction of equity is shown to be exclusive.

" * * * The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character; and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money.' A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens

that the *final* relief, to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' 1 Pom. Eq. Jur. sec. 158 * * * [Claus v. Jamieson, 182 U. S. 461, 479 (1901).]

This case, therefore, falls within the exclusive jurisdiction of equity, because:

- (1) it is an action to determine a breach of trust; and,
- (2) it invokes the special powers of equity to relieve against inequitable conduct.

This was clearly recognized by the Court below¹ which rested its decision on those grounds *and* on the authority of *Kirby v. L. S. & M. S. R. R. Co.*, 120 U. S. 130 (1887), saying, (at p. 526):

"It may be that equity jurisdiction in the instant case is exclusive and not concurrent. Which it is, must be determined not by New York but by federal decisions as to the federal equity jurisdiction existing at the time of the adoption of the Constitution or of the enactment of the Judiciary Act of 1789. At that date, an action against a trustee for breach of trust seems to have been within the exclusive cognizance of equity. And it would seem that the 'jurisdiction' of such a suit is not to be regarded as 'concurrent' for the purposes here under discussion, even if the beneficiary can sue at law. Doubtless a trustee may make a contract imposing upon him legal obligations on which he may be sued on the 'law side'. But his obligations, qua trustee, are presumably still purely

¹ 143 Fed. (2d) 503 at 526.

equitable in the federal courts, no matter how much he may modify them by contract.

"It is, however, of no moment whether here the 'jurisdiction' is or is not exclusively equitable. For the Kirby case (cited with approval in *Benedict v. City of New York*, supra, and *Russell v. Todd*, supra) was a case of concurrent jurisdiction, yet the Court held that, if the defendant's misconduct prevented the plaintiff from learning his right, the New York statute of limitations should be disregarded. Accordingly, whether the equity jurisdiction is exclusive or concurrent, the court, where the defendant is guilty of 'inequitable conduct' causing plaintiff's ignorance of his rights, will toll the statute. In all the cases cited in *Russell v. Todd*, in which, where the equity jurisdiction was concurrent, the Court applied the local limitations statute, either (a) there was no showing whatever of any inequitable conduct of the defendant accounting for plaintiff's ignorance of his rights or (b) the plaintiff, after becoming aware of his rights, slept on them." (foot notes omitted.)

POINT II.

***Mason v. United States*, 260 U. S. 545 (1923), is not dispositive of this case in Petitioner's favor.**

Counsel for Petitioner asserted in oral argument that the Rules of Decision Act applied in equity cases and relied on *Mason v. United States* as supporting that proposition. This was a complete departure from the theory and content of Petitioner's brief, which relied on *Erie v. Tompkins* to import into federal equity the New York statute of limitations.

That Petitioner was aware of the *Mason* decision before the argument is clear: not only was the case mentioned by the Court of Appeals in its opinion: it was cited and dis-

cussed by Petitioner both in the briefs below and in its brief here. Except for the vaguest hint in an obscure footnote,¹ Petitioner never throughout its entire brief relied on *Mason v. United States* as supporting the proposition that the Rules of Decision Act applied as well to equity as to law.

On its facts, the *Mason* case, like the *Dupree* and *Dunlap* cases on which Petitioner leans, involves *rights in land*. It was an action by the United States "brought . . . in equity . . . to have its title to . . . land confirmed, possession thereof restored; defendants enjoined from setting up claims therefo . . ." (p. 552). The trial court and the Court of Appeals both held for the United States. The trial court also granted judgment for the value of the oil removed by defendants while in possession, but allowed them a credit for the cost of the equipment used in extracting the oil. This was done in reliance on a Louisiana statute taken from the Napoleonic Code, described by Laurent and so quoted by this Court, as embodying a "principle of equity" (at p. 556). The Court of Appeals disallowed the credit on the theory that local Louisiana law did not govern. This Court restored the credit, on the ground that *rights in land* were involved which were subject to the *lex loci*. It said (at p. 558):

"The case presented by the bills is primarily one involving title to land and seeking an injunction against continuing trespasses. The conversion of the oil, for which damages are sought, is incidental and dependent. The entire cause of action is therefore, local (*Ellewood v. Marietta Chair Co.*, 158 U. S. 105), and the matter of damages within the controlling scope of state legislation. See *Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co.*, 255 Fed. 645, 647. The enforcement of such a statute in-

¹ See Petitioner's Brief, p. 54, note 17.

an equity suit in no manner trammels or impairs the equity jurisdiction of the national courts."

Elsewhere in the opinion the Court recognized and adhered to the equitable remedies doctrine on which we rely and showed that in its opinion it was not interfering with or destroying that doctrine. Thus the Court explained (at p. 557):

"Subject to certain exceptions, the statutes of a State are binding upon the federal courts sitting within the State, as they are upon the state courts. One of the exceptions is that these statutes may not be permitted to enlarge or diminish the federal equity jurisdiction. *Mississippi Mills v. Cohn*, 150 U. S. 202. That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the States. *Neves v. Scott*, 13 How. 268. But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 358."

POINT III.

The action was filed within the statutory period.

At the oral argument, the Court inquired what disposition was made below of the application of the statute of limitations of New York. The statute of limitations was

¹ Prior to *Eric v. Tompkins*, the *Mason* case was never cited by this Court in support of the proposition here asserted by Petitioner. In *Pan American Co. v. United States*, 273 U. S. 456, 506 (1927), it was cited as "cf." to the statement that "the general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the restitution of a contract."

In *Pennsylvania v. Williams*, 294 U. S. 176, 182 (1935), the Court cited it in support of the statement that "It (i. e., the District Court) was therefore invested with authority to hear and make disposition of the cause, which is not * * * subject to diminution or control by state statutes" (also citing *U. S. v. Howland*, *Neves v. Scott*, and *Mississippi Mills v. Cohn*.)

not pleaded in the trial court. There was *no affirmative defense* either in the affidavits or in any other pleading that was filed below. The statutes were raised and argued in the briefs, *without a plea or defense*. The trial court did *not* decide the issue on the statute of limitations but decided it on the point that a decision in the *Eastman* case (130 F. (2d) 300) was *res adjudicata* of the issues involved in this suit. The Court of Appeals did consider (R. 88) the effect of the statute of limitations. The question was whether the six-year or the ten-year statute applied. The Court below disposed of the six-year statute on the theory, that even if that statute applied, there was a provision under that statute (R. 88-89) that the cause of action based on fraud accrues from the *date of the discovery of the fraud* and that the complaint in the instant case alleged that a fraud was first discovered at about the time that the complaint was filed and that it was concealed from Respondent. It disposed "*arguendo*", *without conceding*, that even if the New York courts have held, as contended, that the statute which authorizes the commencement of a suit for fraud from the date of discovery of the fraud is confined to actions of "fraud and deceit", the contention was inapplicable because the New York decisions, as interpreted by Petitioner, were *not binding* on a federal equity court sitting in a diversity case.

The Court below was correct in declining to adopt Petitioner's interpretation of the New York law. *Guild v. Herrick*, decided Oct. 21, 1944 (51 N. Y. S. (2d) 326). There in the Court stated at page 332:

"Defendants invoke the limitation of six years under Section 48(5) of the Civil Practice Act. They contend that plaintiff's remedies at law and in equity were concurrent, and that therefore the statute of limitations applicable to the legal remedy governs the

action, but that is only so where the remedy at law is complete and adequate. *Hanover Fire Insurance Co. v. Morse Dry Dock & Repair Co.*, 270 N. Y. 86, 200 N. E. 581. Here the character and number of the transactions were such that an accounting is necessary to afford plaintiff complete and adequate relief. The Court has found that the plaintiff did not discover the wrongdoing of the defendants until 1940, and therefore such cause of action is not deemed to have accrued until then. Furthermore, as this is not an action to procure a judgment on the ground of fraud, but is an action in equity for an accounting, and for the other reasons, already stated, the defendants' contentions that the action is barred by the statute of limitations cannot be sustained.

The Court of Appeals thereafter concluded (R. 97) that in this case the ten-year statute applies because *this was purely an equitable case*, and held that federal courts in diversity cases are not bound by New York decisions on the question whether the action was one at law or in equity and the federal courts have the right to determine that question regardless of local decisions. Even the dissenting opinion held that the ten-year statute was applicable (R. 106).

Hackner's suit was commenced nine years after the cause of action accrued and was therefore filed *within the statutory period* (R. 88), and, immediately upon the discovery of the fraud, York did *not* come into the case as an intervenor, as stated in the opinion (R. 88) but, on the contrary, *she came in as an original plaintiff*. After the filing of Hackner's complaint, the complaint was *amended* as of right under Rule 15a, *prior to the filing of a responsive pleading*. (See Record in 313 U. S. 559). The effect of the amendment was as if the suit had been commenced originally in her name and therefore *she commenced her action within the statutory ten year period*.

The opinion pointed out (R. 88) that the original action was filed within the ten year statutory period and, after the termination of that case on *jurisdictional grounds*, the new suit was filed within one year. This was pursuant to Section 23 of the Civil Practice Act (quoted at page 4 of our Brief). The opinion pointed out in note 21 (R. 84) that *the dismissal on jurisdictional grounds is no bar to this action*. This is also the New York law under the *additional one year statute* as cited at page 4 of our Brief.

Petitioner's Brief (pp. 4-5; note 2) seems to imply that the suit of York which was dismissed on jurisdictional grounds was a completely *different* suit from the instant case and therefore urges that Section 23 of the Civil Practice Act granting an additional year to commence a suit after the dismissal of a suit for lack of jurisdiction is inapplicable. This contention is completely without merit for the reason that Petitioner obtained summary judgment on the ground that *the two actions were identical*. It cannot now shift its position on appeal (*New York Life Ins. Co. v. Calhoun*, 114 Fed. (2d) 526, 543; certiorari denied 311 U. S. 701).

Hackner alleged (1) a breach of trust and (2) fraud. He and York sued in the *alternative* (1) for an accounting from the trustee for the "segregated assets", and (2) for damages by reason of the fraudulent acts. Hackner, who *accepted* the "offer" and received his 50% out of the "segregated assets" was entitled, under his complaint, to the *difference*, between the 50% that he received and the *excess*, if any, of the "segregated assets" which the trustee received, plus a loss of 50% resulting from the exchange of one-half of his notes for the worthless stock. York, on the other hand, who *did not accept* the "offer", received "nothing" out of the "segregated assets". She alleged in the amendment to the complaint that she did *not receive*

anything out of the "segregated assets". Her suit was therefore for an "accounting" of *all* of the "segregated assets" which the trustee received and which the Court below found to be *at least* \$106,000 (R. 68), and which Respondent contended to be \$606,000.

It was contended on the Hackner appeal (117 F. (2d) 95) that York was *improperly joined* with Hackner because her cause of action was that of a non-acceptor while Hackner's cause of action was for fraud because of his acceptance of the offer. The Court of Appeals sustained the contention and held that *she was improperly joined* as a party and that the Court was *without jurisdiction* of her cause of action (117 Fed. (2d) 95; 130 Fed. (2d) 300).

The amendment to the complaint in the Hackner suit shows that York sued for an accounting from the trustee for the "segregated assets" which the trustee appropriated to its own use and she received "nothing" of the \$605,000 and lost everything. The cause of action alleged in the present complaint is *the same*. They are, therefore, *identical* and the New York statute granting her the *additional year* is applicable.

Respondent has a right to urge any point in *support* of the judgment of the Court of Appeals regardless of whether the additional one year of grace provided for in Section 23 of the Civil Practice Act was mentioned in the opinion or not or whether the judgment of the court was based thereon. While reasons may not be urged on appeal for the purpose of obtaining a *reversal*, they may be raised for the first time on appeal for the purpose of *sustaining* an *affirmance* (4 Corpus Juris, p. 1132, Section 3135 and cases there cited).

POINT IV.

This Court has committed itself to the doctrine that there is a federal equity jurisdiction which is not and could not be limited by any state law as to equitable remedies.

In the Austrian brief as *Amicus Curiae* counsel cited (pp. 3-14) authorities prior to *Eric v. Tompkins* dealing with the proposition that federal courts of equity are not bound by local law to the application of "equitable remedies". It is urged by Petitioner that all of these cases were overruled by *Eric v. Tompkins*. On the oral argument, Mr. Justice FRANKFURTER inquired whether subsequent to the *Eric* case the Court held that the doctrine of "equitable remedies" applied in federal equity cases in disregard of state law, and our answer was in the affirmative and we promised to supply authorities.

In order to determine whether the *Eric* case is applicable to "equitable remedies", one must look to the reasoning behind that case. It was based on the dissenting opinion in *Swift v. Tyson* and cites the dissenting opinion of Mr. Justice HOLMES in *B. & W. Taxi Co. v. B & Y Taxi Co.*, 276 U. S. 518. There he based his dissent on an interpretation of the common law. The opposite view was expressed in relation to "equity jurisdiction".

Mr. Justice FRANKFURTER, after the *Eric* case, elucidated (in *Sprague v. Ticonic Bank*, 307 U. S. 161) that the "source" of "equity" jurisdiction of the federal courts is "that body of remedies * * * which theretofore had been evolved in the English Court of Chancery", and that "the sources * * * uniformly support the power" of equity courts. The same view as to the source of "equity" power was expressed by Mr. Chief Justice STONE subsequent to the

Erie case: (*Atlas Insurance Co. v. Southern Inc.*, 306 U. S. 563-568.)

Equity came to remedy the rigors of the common law. In many cases, it *restrained* the execution of judgments obtained at law. Instances of "equitable remedies" are numerous where the Chancellor has granted relief. The law of redemption may serve as an illustration. Another example is ignorance of the existence of a cause of action which was *concealed* until the action was *barred at law*. There relief to remove the bar was given in equity. (*Dodds v. McColgan*, 229 A. D. 273.)

Prior to the decision of the *Erie case*, Mr. Chief Justice STONE in his opinion in *DiGiovanni v. Camden Ins. Assn.* (296 U. S. 64) disregarded the contention that under the state law there was an adequate remedy at law and therefore, the federal court was bound by the state law to deny the remedy by saying at page 69:

"It is true, as this Court often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of the remedy afforded in federal, rather than state courts of law. . . . This follows from the nature of 'equity jurisdiction' of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits: . . ."

It is evident therefrom that the *power* of the federal court or "jurisdiction" *exists* to afford *any* "equitable remedy" to which a suitor is entitled regardless of state court denials of such remedies, and that the only question

in the federal court is whether the federal court should *grant a remedy* which is a matter of *discretion*; but is *not* a question of *power*. Only in such a way will the federal equity jurisdiction "retain equity as a living system and save it from sterility". (*Sprague v. Ticonic Bank*, 307 U. S. 161, 167.) This, therefore, is in *accord* with the decision in the instant case that in so far as the application of the federal remedy to the suitor to grant him relief in a court of equity after the bar of a state statute of limitations as construed by the state court, is *not applicable* in the federal court because the *power* of the federal court is determined by *federal equity* and not by *state law*.

That the equitable remedies doctrine has been approved by this Court since *Eric v. Tompkins* is made plain in *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1941). We refer the Court to a full consideration of this case in the brief of Austrian as *Amicus Curiae*, at pages 35-45.

In the latest decision of this Court in *Hazel Glass Co. v. Hartford*, 322 U. S. 238, this Court applied an "equitable remedy" to an extraordinary case. There it held that because of concealment of fraud, a litigant could obtain a bill of review in a federal court of appeals after the expiration of the term of the issuance of the mandate. The Court applied the *conscience* of a chancellor which knows no limits and held that *no fraud could stand in the way of equitable remedy* and applied the broad principle of equity in granting relief in that case. All of the decisions of this Court both *prior* and subsequent to the *Eric* case *adhere* to the principle that federal equity jurisdiction exists as it existed in England when the constitution was adopted. Therefore the decision in *Eric v. Tompkins* is wholly *inapplicable* here on the question to which the writ was limited.

On the oral argument, Mr. Justice FRANKFURTER asked whether, upon the assumption that a New York resident could not have maintained the equitable action because of the bar of the statute, would a non-resident have a greater right by the use of the federal courts because of diversity of citizenship? Our answer is, we respectfully submit, that there is no basis for the assumption because if York were a resident she could have maintained the equitable action in New York to remove the bar of the statute because of the concealment of the fraud as held in *Dodds v. McColligan*, 229 App. Div. 273 (Cf. *David Lupton's Son v. Auto Club of America*, 225 U. S. 489.)

In *Great Lakes Co. v. Huffman*, 319 U. S. 293, 297, the Court cited *Stratton v. St. L. S. W. Ry. Co.*, 284 U. S. 530. In the *Stratton* case the Court said at pages 553, 554:

"This statute * * * can neither enlarge nor diminish the equity jurisdiction of the federal courts * * *. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them, by the state practice."

The brief of the Securities Exchange Commission as *Amicus Curiae* suggests that the extension of the rule in *Eric v. Tompkins* to "equity" would be contrary to national policy. It should be borne in mind that while the trustee is a resident of New York, the Van Sweringen corporation, which issued the thirty million dollar note issue, was a non-resident. The "segregated assets" were kept not in New York, but in Ohio, and the bond issue was sold throughout the United States. The "fraud" was committed by the "offer" which was mailed to the non-resident note holders,

so that this is not the ordinary case to which local law is applicable.

Respectfully submitted,

MEYER ABRAMS,
134 North La Salle Street,
Chicago, Illinois,

BENNETT I. SCHLESSEL,
1450 Broadway,
New York, N. Y.,
Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street,
Chicago, Illinois,
Of Counsel.

January 10, 1945.

IN THE
**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1944.

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,

vs.

GRACE W. YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**MOTION FOR LEAVE TO SUGGEST
ADDITIONAL AUTHORITIES.**

MEYER ABRAMS,
134 North LaSalle Street,
Chicago, Illinois,

BENNETT I. SCHLESSEL,
1450 Broadway,
New York, N. Y.,
Attorneys for Respondent.

SHULMAN, SHULMAN AND ABRAMS,
134 North LaSalle Street,
Chicago, Illinois,
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ADDITIONAL AUTHORITIES.**

Now comes Grace W. York, Respondent, by Meyer Abrams and Bennett I. Schlessel, her attorneys, and moves for leave to suggest additional authorities as follows:

1. Under the heading "Fourth Circuit" at page 18 of respondent's original brief add: *Purcell v. Summers, et al.*, 145 F. (2nd) 979.

2. Under Point I of Respondent's Supplemental Brief (p. 6) at the end of the last paragraph add: *Citizen's State Bank v. Monticello State Bank*, 143 F. (2d) 261.

3. Under Point IV of the Supplemental Brief (p. 25), add: *Hecht & Co. v. Bowels*, 321 U. S. 321.

Suggestions in support of the motion are attached hereto.

MEYER ABRAMS and
BENNETT I. SCHLESSEL,
Attorneys for Respondent.

SUGGESTIONS IN SUPPORT OF MOTION.

I.

Under Point III (b) Respondent cited the views of the ten Circuit Courts of Appeal on their construction of *Russell v. Todd*. They cited a decision of the Fourth Circuit (p. 18) which said that it was "to say at least" extremely "doubtful" whether the statute of limitations would be applied in equity. Since the oral argument there was published in the advance sheet of February 5, 1945, another decision of the Fourth Circuit. (*Purcell et al. v. Summers, et al.*, 145 F. (2d) 979). There, the "doubt" was eliminated. In discussing the application of the *Erie* case to equity, the court said (p. 990):

"We look to state law to determine what the rights of the parties are; but we look to the federal practice to determine the remedies available in the federal courts for their protection in a federal suit in equity. *Russell v. Todd*, 309 U. S. 280, 287, 60 S. Ct. 527, 84 L. Ed. 754; *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 164, 59 S. Ct. 777, 83 L. Ed. 1184; *Matthews v. Rodgers*, 284 U. S. 521, 529, 52 S. Ct. 217, 76 L. Ed. 447; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 128, 50 S. Ct. 270, 74 L. Ed. 737; *Crosley Corp. v. Hazelton Corp.*, 3 Cir., 122 F. 2d. 925, 927; *Black & Yates v. Mahogany Ass'n*, 3 Cir., 129 F. 2d. 227, 233."

and it adopted the view of the Third Circuit by quoting at length from the decision last cited.

II.

Respondents urged in the Supplemental Brief (pp. 2-16) that the complaint in the instant case stated a cause

of action which is purely within the jurisdiction of equity. Since the oral argument our attention was called to a recent decision of Eighth Circuit (*Citizens Banking Co. v. Monticello State Bank*, 143 F. (2d) 261). In that case there was a class suit brought by some noteholders for the benefit of the entire class against the Trustee, and the court held that this was purely a suit in equity. At page 264 the court said:

"This is an action properly cognizable in equity to avoid a multiplicity of actions and for accounting of a trust fund (*Dillman v. Hastings*, 144 U. S. 136, 140, 12 S. Ct. 662, 36 L. Ed. 378; *Irvine v. Dunham*, 111 U. S. 327, 334, 4 S. Ct. 501, 28 L. Ed. 444; *City of Jacksonville v. Bankers Life Co.*, 7 Cir., 90 F. 2d 141, 144; *Lewis v. Ingram*, 10 Cir., 57 F. 2d 463, 466, certiorari denied 287 U. S. 614, 53 S. Ct. 16, 77 L. Ed. 533; *Ingram v. Lewis*, 10 Cir., 37 F. 2d 259, 260, 70 A. L. R. 702, certiorari denied 282 U. S. 842, 51 S. Ct. 22, 75 L. Ed. 747). That the relief asked is in money does not affect the right of the beneficiaries to proceed in equity (*Lewis v. Ingram*, 10 Cir., 57 F. 2d 463, 466, certiorari denied 287 U. S. 614, 53 S. Ct. 16, 77 L. Ed. 533)—such money recovery is usually the only way of replacing a trust fund where other character of property therein has been dissipated."

III.

Under Point IV in the Supplemental Brief, Respondent discussed the principal point upon which the *Erie* case was decided, based on the proposition that there is no *Federal common law* because the common law *did not descend from England* and the "law" is therefore confined to the Statutes and decisions of the various States. We urged that there is a *Federal equity law* which is founded on the principles of equity which *descended from England*. This view appears from the decision in *Hecht & Co. v. Bowels*, 321 U. S. 321. At page 329 this Court said:

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'an appeal to the equity jurisdiction conferred on federal district court is an appeal to the sound discretion which guides the determination of courts of equity.' *Meredith v. City of Winter Haven*, 326 U. S. 228, 255, 64 S. Ct. 7, 14. . . . The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

It is apparent that equity jurisdiction is not limited by State boundaries and the conscience of the chancellor "guides" his determination "to mold each decree to the necessities of the particular case", as was done by the Court of Appeals in this case.

Respectfully submitted,

MEYER ABRAMS,

BENNETT I. SCHLESSEL,

Attorneys for Respondent.

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IN THE
Supreme Court of the United States
October Term, 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,

Petitioner,

against

GRACE W. YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR AMICUS CURIAE.

J. Cloyd Kent, Overton D. Dennis and Carl J. Austrian,
as Trustees of Central States Electric Corporation, a
Debtor in reorganization proceedings under Chapter X
of the Bankruptcy Act, *Amicus Curiae.*

CARL J. AUSTRIAN,

Attorney for Amicus Curiae,

111 Broadway,

New York, New York.

SAUL J. LANCE,

ISADORE H. COHEN,

Of Counsel.

December 29, 1944.

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IN THE
Supreme Court of the United States
October Term, 1944

No. 264

GUARANTY TRUST COMPANY OF NEW YORK,
Petitioner,
against
GRACE W. YORK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR AMICUS CURIAE.

Question Presented.

In an equity case in a federal court based on diversity of citizenship, is the court bound by the state statute of limitations held to govern like cases by the state courts?¹


Summary of Argument.

Petitioner argues (Brief, p. 7) that the New York statute of limitations is part of the substantive law of New York.

¹ For an explanation of the interest of Amicus Curiae in this question, see *Committee For Holders of Central States Electric Corp. etc. v. Kent*, and *Dennis*, as Trustee, 143 Fed. (2d) 684 (C. C. A. 4th, 1944) *passim*.

As appears from that case, the Court of Appeals directed the District Court to appoint an independent trustee for the purpose of inves-

(Continued on page 2)

2 

which must be applied by federal courts of equity sitting in New York in diversity suits; that this is required by the doctrine established in *Erie v. Tompkins*, 304 U. S. 64 (1938); that *Erie v. Tompkins* "overruled" the doctrine of remedial rights which was "invoked by the Court below to avoid application of the New York statute of limitations"; and that accordingly "the New York statute of limitations is completely determinative of this action."

We do not agree.

We shall show:

1. that there is a federal equity jurisdiction which cannot be impaired by the laws of any state;

2. that a rule which would deny to a federal court sitting in equity its inherent right to apply the doctrine of laches but would require it to apply the statute of limitations of the state where the court is sitting is an impairment of the federal equity jurisdiction within the meaning of *Robinson v. Campbell* and the authorities resting thereon;

3. that the New York statute of limitations is not part of the substantive law of the State of New York which must

(Continued from page 1)

litigating and bringing suit on any causes of action against the old management. In reply to the contention that any such causes of action were barred by the statutes of limitations of the relative states where the actions might be brought, the Court said (at p. 687):

* * * and suit might be brought in a federal court of equity, where, to say the least, it is extremely doubtful that the statutes would be followed * * *

The Court also pointed out the substantial amount of the causes of action charged against the old management, claimed to be barred, and stated that the Bankruptcy Court should not lightly stay its hand in enforcing such causes of action. For considerations of policy regarding this aspect of the case, see the Brief of the Securities and Exchange Commission filed herein as *Amicus Curiae*.

be applied by federal courts of equity in New York in diversity suits since statutes of limitation affect only the remedy and are not substantive; and

4. that the doctrine of remedial rights was not overruled in *Eric v. Tompkins* but has been reaffirmed by this Court in *Kellean v. Maryland Casualty Co.*, 312 U. S. 377 (1941).

POINT I.

There is a federal equity jurisdiction which cannot be impaired by the laws of any state.

The Constitution provides for a federal judicial system¹ and extends the judicial power of the federal courts "to all Cases in Law and Equity."² Congress, by the Rules of Decision Act,³ and the Conformity Act,⁴ provided that the laws of the several states and the practice there governing should apply in trials *at law* in the federal courts. No similar legislation was ever enacted with respect to *equity* causes.⁵

¹ Article 3, section 1.

² Article 3, section 2.

³ Act of Sept. 24, 1789, c. 20, § 34; 1 Stat. 92; Rev. Stat. § 721; 28 U. S. C. § 725.

⁴ Rev. Stat. § 914; 28 U. S. C. § 724.

⁵ In 1789 it was provided that the forms of mesne process and the modes of proceeding in suits of equity "shall be according to the principles, rules and usages which belong to courts of equity. * * * (4 Stat. 93; 28 U. S. C. § 723). The Conformity Act explicitly excludes from its operation cases in equity [17 Stat. 197 (1872); 28 U. S. C. § 724]. Equity rules of court formulated by the Supreme Court and lower federal courts pursuant to 5 Stat. 518 (1842); 28 U. S. C. § 730 and 36 Stat. 1132 (1911), 28 U. S. C. § 219, mostly disregarded state practice; the Supreme Court prescribed the practice of the High Court of Chancery (in the field not regulated by express rule) first as a command [Rule 33 of 1822, 7 Wheat. (26 U. S.) XIII]; and later as an analogy to "be applied consistently with the local circumstances * * *" (Rule 90 of 1842, 1 How. LXIX). The latter rule was repealed by Rule 81 of 1912 [*Hopkins, Federal Equity Rules* (7th ed. 1930) 361].

Recently this Court has defined and explained the scope of federal equity jurisdiction in *Atlas Insurance Co. v. Southern Inc.*, 306 U. S. 563, 568 (1938) as follows:

"Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have cognizance . . . of all suits of a civil nature at common law or in equity in cases appropriately brought in those courts. This provision is perpetuated in § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), which declares that the district courts shall have jurisdiction of such suits. The jurisdiction thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. *Payne v. Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210; *Matthews v. Rodgers*, 284 U. S. 521, 525; *Gordon v. Washington*, 295 U. S. 30, 36. This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity."

Beginning with the decision in *Robinson v. Campbell*, 3 Wheat. 212 in 1818, this Court has repeatedly asserted that the equity jurisdiction of the federal courts could not be altered by state law;—and any attempted alteration was

¹ In *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939) the Court held that the District Court could in an equity case grant special costs "as between solicitor and client" and said that the allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts" (164).

struck down whether it enlarged or abridged the federal equity power.¹ The Court explained the doctrine in *Robinson v. Campbell* at page 221, as follows:

"There is a more general view of this subject, which deserves consideration. By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the Judiciary Act of 1789, it is provided, that the laws of the several States, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May 8, s. 2, 1792, confirms the modes of proceeding in suits at common law in the courts of the United States, and declares that the modes of proceeding in suits of equity shall be 'according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law,' except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of congress, by these provisions, to confine the court of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective States. In other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only, when, according to such practice, a plain, adequate, and complete remedy could not be had at law. In some states in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognize and enforce in suits at law, all the equitable

¹ Von Moenchgischer, *Equity Jurisdiction in the Federal Courts*, 75 Un. of Pa. L. Rev. 287 (1927), *passim*.

claims and rights which a court of equity would recognize and enforce; in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such States, the exercise of equitable jurisdiction. The acts of congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, think, that, to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law, or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."¹

U. S. v. Howland, 4 Wheat. 108 (1819), was a bill in equity in the federal court against a debtor's debtor to recover a sum of money alleged to be due to complainant's debtor, an insolvent. A Massachusetts statute allowed such a suit at law. The Circuit Court dismissed the bill. This Court reversed, saying (per MARSHALL, C. J., at p. 115):

"The case . . . would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor.

¹ We have not here attempted to collect all the cases dealing with this doctrine. The Court of Appeals has stated that "the progeny of *Robinson v. Campbell*, are legion" (143 Fed. (2d) 503 at p. 522). See also, *Benedict v. New York*, 250 U. S. 321, 327-328 (1918); *Gamewell Fire Alarm Tl. Co. v. The Mayor*, 31 Fed. 312 (S. D. N. Y., 1887); *Black & Yates v. Mahogany Ass'n*, 129 Fed. (2) 227, 232 (C. C. A. 3rd, 1941) cert. den. 317 U. S. 672 (1942); *Miami County National Bank v. Bancroft*, 121 Fed. (2) 921, 923 (C. C. A. 10th, 1941); *The Maccabees v. City of North Chicago*, 125 Fed. (2) 330, 333 (C. C. A. 7th, 1942); *Matthees v. Rogers*, 284 U. S. 523, 529 (1932); *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 43 (1909).

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Still, the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there, in such cases, ascertained with more certainty and facility; and as the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States."

In *Payne v. Hook*, 74 U. S. 425, 429 (1868), the Court struck-down an attempt to measure the jurisdiction of a federal court of equity by that extant in a state court, saying:

"The theory of the position is this: that a Federal court of chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local Court of Probate, she has no better or different rights because she happens to be a citizen of Virginia.

"If this position could be maintained, an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

"We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.

"The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief."

McConihay v. Wright, 121 U. S. 201 (1887), was a bill in equity in a federal court on diversity grounds, to quiet title to real estate. A West Virginia statute permitted the relief to be obtained in an action of ejectment against a defendant not in possession. A decree was rendered in complainant's favor and appellants assigned as error "a complete and adequate remedy at law" (p. 205). In affirming the decree, the Court said (at p. 206):

"Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or di-

minished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress.

In *Dodge v. Tulleys*, 144 U. S. 451, 457 (1892) the Court said as to a federal equity court's power to make a reasonable allowance for counsel fees to a trustee, although denied by state decisions otherwise applicable if the suit were in a state court, that:

"In the cases cited, the Supreme Court of the State held that by the repeal of the statute the contract right to recover attorney's fees was taken away. So, as this court follows the decisions of the highest court of the State in such matters, (*Bendey v. Townsend*, 109 U. S. 665) the provision in the trust deed for the payment of \$1000 as attorney's fees cannot be regarded as of binding force. But while contract rights are settled by the law of the State, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the State. There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in Federal equity courts. They proceed according to the general rules of equity, except so far as such rules are changed by the legislation of Congress; and while

they may enforce special equitable rights of parties given by state statutes, (*Holland v. Challen*, 110 U. S. 15), yet their general powers as courts of equity are not determined and cannot be cut off by any state legislation. It is the general rule of equity, that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and included therein is a reasonable allowance for counsel fees. This is constantly enforced in the Federal Courts in the various railroad foreclosures that have been and are proceeding therein, and this, irrespective of any state legislation."

In *Mississippi Mills v. Cohn*, 150 U. S. 202, 204 (1893), the Court held that the jurisdiction of the federal equity court to entertain a creditor's bill could not be diminished by a state statute granting a remedy at law, saying:

"It is well settled, that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged or diminished by state legislation. Though by it all differences in forms of action be abolished, though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged. * * * See also *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451, in which a state statute, extending the jurisdiction of equity to matters of a strictly legal nature, was held inapplicable to the Federal courts, and unavailing to vest a like jurisdiction in such courts, sitting as courts of equity."

In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371 (1893) an action was brought by simple contract creditors of a corporation for the sale of the corporate property and the appointment of a receiver in order to obtain payment of their claims. They appealed from a decree dismissing their bill on the merits. In holding that the bill should have

been dismissed for want of jurisdiction the Court said (at p. 379):

"It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the State may authorize such a proceeding in the courts of the State. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. . . ."

Smyth v. Ames, 169 U. S. 466 (1898), was a bill in equity wherein complainants sought a decree enjoining defendants, who constituted a State Board of Transportation, from enforcing certain rates on the ground that the state statute prescribing such rates was repugnant to the Constitution of the United States. A Nebraska statute provided that an action could be brought in the state courts to revise the rates fixed, if found to be unreasonable. Defendants argued, in appealing from a decree granting an injunction against them, that the Nebraska statute granted an adequate remedy at law and took from the federal courts "its equity jurisdiction in respect of the rates prescribed and required the dismissal of the bills" (p. 516). In affirming the decree below, the Court overruled this argument, saying (at p. 516):

"We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit

such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In *Gaffey v. Smith*, 237 U. S. 101, 114. (1915), the Court refused to allow the District Court's jurisdiction in equity to be diminished by state decisions withholding equitable relief where a lease contained a clause giving the lessee an option to surrender, saying:

"The Supreme Court of Illinois, while fully sustaining the right to maintain such a suit in the courts of the State when the lease contains no clause giving the lessee an option to surrender it (*Gillespie v. Fulton Oil and Gas Co.*, *supra*), holds that the presence of such a clause in the lease operates to prevent the lessee from directly or indirectly enforcing it in equity (*Watford Oil and Gas Co. v. Shipman and Uray v. Keith*, *supra*), the ground of distinction being that the surrender clause, although lawful in itself and not affecting the validity of the lease, renders it so lacking in mutuality that equity will remit the lessee to his remedy at law. These decisions, it is insisted, should have been accepted and applied by the Circuit Court. To this we cannot assent. By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat., §§ 913, 917; *Nere v. Scott*, 13 How. 268, 272; *Payne v. Hook*, 7 Wall. 425, 430. *Dodge v. Tuleys*, 144 U. S. 451, 457; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204. As was said in the first of these cases, 'Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for

this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable."

In *Pusey & Jones Co. v. Haussen*, 261 U. S. 491, 497 (1923), it was held that a federal court sitting in equity could not, by virtue of a state statute, obtain jurisdiction to appoint a receiver of an insolvent corporation on the application of an unsecured contract creditor, saying:

"That a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute is likewise clear, *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451. Nor can it be so narrowed, *Mississippi Mills v. Cohn*, 150 U. S. 202; *Guffey v. Smith*, 237 U. S. 101, 114. The federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. Haussen's contention is that the statute does not enlarge the equitable jurisdiction or remedies; and that it confers upon creditors of a Delaware corporation, if the company is insolvent, a substantive equitable right to have a receiver appointed. If this were true, the right conferred could be enforced in the federal courts, *Scott v. Neely*, 140 U. S. 106, 109; since the proceeding is in pleading and practice conformable to those commonly entertained by a court of equity. But it is not true that this statute confers upon the creditor a substantive right. * * * The Delaware statute does not confer upon creditors the right to have a receiver appointed, although the insolvency of the corporation may be palpable, hopeless and attended by indisputable fraud or mismanagement. Insolvency is made a condition of the Chancellor's jurisdiction; but it does not give rise to any substantive right in the creditor. *Jones v. Maxwell Motor Co.*, 115 Atl. (Del.) 312, 314, 315. It makes possible a new remedy because it confers upon the Chancellor a new power. * * * Whatever its exact nature, the power enables the Chancellor to afford a

remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts sitting in equity."

City Bank Co. v. Schnader, 291 U. S. 24 (1933), was a bill in equity in a federal court under its diversity jurisdiction brought against certain officers of the Commonwealth of Pennsylvania for a decree enjoining them from imposing and collecting an inheritance tax on personal property left by a New York decedent which had no taxable situs in the Commonwealth. A Pennsylvania statute provided a remedy by an administrative proceeding not available in a federal court. The defendants argued that complainants had an adequate remedy at law under the Pennsylvania procedure. The bill was dismissed by the District Court. In reversing this decree, the Court said (at p. 29):

"As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts either as an original action or by removal, its existence cannot oust federal equity jurisdiction. *Smyth v. Ames*, 169 U. S. 466, 516; *Chicago, B. & Q. R. Co. v. Osborne*, 265 U. S. 14, 16; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388; *Matthews v. Rodgers*, *supra*, p. 526."

The corner-stone of Petitioner's argument is *Eric v. Tompkins*. Petitioner asserts that the decision in that case has overruled and swept away the entire body of law which we have called the "equitable remedies" doctrine and which was established by this Court in the series of cases beginning in 1818, just cited and discussed. We shall show hereafter, and to the contrary, that Petitioner is in error in this argument and that *Eric v. Tompkins* has no bearing or effect

whatsoever on the "equitable remedies" doctrine. For the present it is sufficient to note that in 1940—after *Eric v. Tompkins*—this Court in *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1940), reaffirmed the doctrine of "equitable remedies" by adverting to and quoting from *Pusey & Jones v. Haussen*, 261 U. S. 491, 497 (1923), one of the leading cases in the development of that doctrine.

POINT II.

A rule which would deny to a federal court sitting in equity its inherent right to apply the doctrine of laches but would require it to apply the statute of limitations of the state where the court is sitting is an impairment of the federal equity jurisdiction within the meaning of the authorities set forth in Point I.

While the Rules of Decision Act has always imported into *law cases* in the federal courts state statutes of limitations as construed by the courts of the several states, this Court has refused to sanction their application in federal *equity causes*. Instead, it has insisted that the sole measure of equity jurisdiction in that regard shall be determined by laches.¹ Laches, an ancient equitable doctrine, left the limits of time in equity to the chancellor for determination. It is self-evident that if the federal chancellor's jurisdiction were inexorably confined in all cases by state statutes of limitation, then the uniformity of the equity power of federal courts would be destroyed and their jurisdiction subject to severe contraction, if not destruction.

Laches is "part of the historic equity jurisdiction of the federal courts. The suits 'in equity' of which these

¹ Rule 8c makes provision for the affirmative pleading of "laches" as well as "statute of limitations" as matters "constituting an avoidance or affirmative defense."

courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery * * * (*Sprague v. Ticonic Bank*, 307 U. S. 161, 164.)

This equitable jurisdiction would be diminished if the federal courts were compelled in every case to apply, not the doctrine of laches, but a limitation of time arbitrarily fixed by state statute. It is plain that a state statute of limitations, if compulsorily applied in federal equity, would place it in the power of the several states to destroy what may be described as the "time-scope" of federal equity jurisdiction through the enactment of restrictive limitations otherwise inapplicable in a federal court sitting in equity. Just as this Court has refused to permit diminution of federal equity jurisdiction through the application of state statutes limiting the scope of federal equity jurisdiction, so it will not tolerate an abridgment of the federal chancellor's power through the guise of imposing on a federal court, sitting in equity, a constricted time limitation applicable in the state court.

This Court so held in *Kirby v. Lake Shore & M. S. R. R. Co.*, 120 U. S. 130 (1887). There in an equity case in a federal court based on diversity of citizenship the Court held that the District Court was not bound by a state statute of limitations held to govern in a similar case in the state court. The Court sanctioned and approved the application

In *Benedict v. City of New York*, 250 U. S. 321 (1918) the Court sustained a defense of laches in a suit in equity. While the New York Code provided for a ten year limitation, the action was brought long after the statutory period had run. The significance of the decision is that the Court applied equitable principles in reaching its decision, pointing out (a) that plaintiff's "lack of diligence is wholly unexcused" (p. 328); (b) that "the lower courts did not err in sustaining the defense of laches" (p. 328) and (c) cited the *Kirby* case in support of the statement that " * * * federal courts, sitting in equity are not bound by state statutes of limitation. * * *" (p. 327).

of the doctrine of laches and rejected the argument that the state statute of limitations governed in a federal court sitting in equity, saying (at p. 137):

"These observations (governing the applicability of the doctrine of laches in equity) were made with reference to an act of Congress prescribing a fixed time within which a suit between an assignee in bankruptcy and persons asserting adverse rights in property conveyed to such assignee should be brought. They are peculiarly applicable to a local statute, which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and the laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties, and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit. . . . In view of these authorities, it is clear that the statute of New York upon the subject of limitation does not affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should, with due diligence, have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every state. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules must be taken subject to the qualification that the

equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud."¹

Thus the Court in the *Kirby* case has already answered in the negative the question presented in the writ. There, in an equity case in a federal court based on diversity of citizenship, it was held that the federal court was not bound by the state statute of limitations held to govern in a similar case in the state court, but could apply the doctrine of laches. We shall show hereafter that the authority of the *Kirby* case has not been impaired by *Eric v. Tompkins* and that the *Kirby* case is determinative of the question presented.²

¹In *Russell v. Todd*, 309 U. S. 280 (1940), the Court said (footnote 1, p. 288) " * * * federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of special equitable doctrines, making it inequitable to apply the statutes. * * *. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant."

²The dissent in the Court of Appeals does not dispute this ("... it seems probable that equitable claims may be asserted in extreme situations even if the local statute of limitations has expired ..."), but merely urges that this may only be done in "rare" situations, and denies that the one disclosed by the record is such an instance.

POINT III.

The New York statute of limitations is not part of the substantive law of the State of New York which must be applied by federal courts of equity in New York in diversity suits since statutes of limitation affect only the remedy and are not substantive.

Petitioner argued, in applying for the writ, that the defense of the statute of limitations "constituted a substantial right" and "while procedural in form, such a defense has a substantive content"¹ Petitioner now relies on this as the keystone of its entire brief. The proposition which it seeks to establish (Brief, p. 16) is that "the statute of limitations . . . remains a part of substantive law . . ."

This argument is completely erroneous.

At the outset it should be noted that Petitioner is compelled to make this argument because of its reliance on *Eric v. Tompkins*. But the most that Petitioner can claim for the extent of *Eric v. Tompkins* in equity is that it applies to matters of "substance". For that reason Petitioner is forced to assert and argue that statutes of limitation are "matters of substance."

It may be conceded *arguendo* that *Eric v. Tompkins* does apply to "substantive" matters in law and equity² alike—although we reserve for later comment the contrary asser-

¹ Brief in support of petition for writ, at p. 25.

² *Cl. Cities Service Oil Co. v. Dunlap*, 308 U. S. 208 (1939); JACKSON, J., concurring in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447 (1942) said that "The Court has not extended the doctrine of *Eric R. Co. v. Tompkins* beyond diversity cases" (at p. 467). In a footnote to this statement he added "Its effect even in such cases seems not to have been definitely settled" and compared the statement in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 203 ("the doctrine applies . . . in equity.") with *Russell v. Todd*, 309 U. S. 280, 287 (1940). ("The Rules of Decision Act does not apply to suits in equity"). Since the Court has not in any case after 1938 given extended consideration to this question, we believe it is still open.

tion by this Court in *Russell v. Todd*¹—and yet Petitioner cannot succeed in perverting a simple limitation of time into a matter of “substantive” right.

Again, at the outset, it should be noted that to make this argument, not only must Petitioner rely on *Erie v. Tompkins*, but it must ignore the effect of the adoption of the Rules of Civil Procedure after the decision in *Erie v. Tompkins*. The Rules of Civil Procedure, which now regulate and define the practice in law and in equity in the federal courts, not only do not destroy the doctrine of laches, but on the contrary, expressly recognize the doctrine of laches as a matter of avoidance and defense requiring affirmative pleading. (See Rule 8c.)²

That Petitioner recognizes the effect of the inclusion of laches as a defense in the Rules of Civil Procedure plainly appears on page 19 of its Brief. In attempting to escape the force of the express inclusion in the Rules of the defense of laches, Petitioner argues that the Rules say nothing about the “content” of this defense and concludes, therefore, that laches, like the other defenses specified in the Rules, are “matters of substantive law which in diversity cases are controlled by the law of the State of the forum.” No authority is cited for this extraordinary proposition.

The Rules, by the terms of the Enabling Act, and by their own terms, “govern the procedure in the district courts . . . in all suits . . . at law or in equity . . .” (Rule 1). Obviously, when this Court included laches as a defense in equity suits, it deemed it a procedural matter

¹ See, *infra*, p. 44.

² The rules do not abolish the distinction between law and equity [*Edelson v. Metropolitan Life Insurance Co.*, 317 U. S. 188 (1942)]. Accordingly Rule 8c. represents an expression by the Congress, through the Enabling Act (48 Stat. 1064; 28 U. S. C. §§ 723 (b), (c)), that laches applies as the measure of time in equity, while limitations apply at law. Congressional power so to regulate practice and procedure is undoubted [*Sibbach v. Wilson & Co.*, 312 U. S. 1, 9 (1941); cf. REED, J., in *Erie v. Tompkins*, 304 U. S. at p. 92].

not abridging "the substantive rights of any litigant" within the Congressional Act (48 Stat. 1064). Moreover, "laches" is a term whose content has been determined by decisions rendered from the inception of Equity. There was no more need to define the "content" of laches in the Rules than there was to define the content of "Equity" in the Constitution.

Similar efforts (like that here attempted by Petitioner) to convert the statute of limitations into a matter of substance have been made before this. Every such effort to establish that proposition has invariably been rejected.

(i) *State extensions of limitation of time.* No federal constitutional restriction exists against a state statute extending the period of limitations, and such a statute is not invalid even if applied to a debt previously barred by a former period of limitations. Obviously, since the debt was not destroyed by the former limitation statute—which merely barred matters of remedy, and not the basic right—the legislature could *enlarge* the procedural remedy. Thus in *Campbell v. Holt*, 115 U. S. 620 (1885), defendant's obligation became barred in 1866. In 1869 Texas adopted a new constitution which removed the bar of the statute, and plaintiff then recovered judgment. Defendants argued that "the bar of the statute, being complete and perfect, could not, as a defense, be taken away by this constitutional provision, and that, to do so, would violate * * * the Fourteenth Amendment * * *" (p. 622). In rejecting the argument, and affirming the judgment of the Supreme Court of Texas, the Court said (p. 628):

¹ In *Paramino Co. v. Marshall*, 309 U. S. 370 (1940) five years after an award in compensation had become final, Congress, by private act, ordered a review in the particular case—"the provision in the Compensation Act limiting time for reviewing awards 'to the contrary notwithstanding' * * *" (p. 375). Pursuant thereto a new award was made, and sustained by this Court, against objection that the private act violated the due process clause of the Fifth Amendment.

"We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost. . . .

"We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word property, to choses in action, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.

"We can understand a right to enforce the payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations."

(ii) *State diminution of time limitations.* But a state statute diminishing an existing period of limitation must allow a reasonable time after the effective date thereof for the commencement of suit on existing causes of action.¹ This Court said in discussing such a statute:

“ . . . such is the rationale of statutes of limitations. They do not necessarily lessen rights of property or impair the obligation of contracts”²

And clearly, they are not property rights.³ In sustaining a legislative alteration of a period of limitation the Supreme Court of Louisiana said:⁴

“ It is in its nature a statute of limitations. The right of the State to prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exist at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the State may establish, alter, lengthen, or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute.”

¹ *Wilson v. Iseminger*, 185 U. S. 55, 62 (1902); cf. *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 562 (1920).

² *Atchafalaya v. Williams Co.*, 258 U. S. 190, 197 (1922).

³ In *National Surety Co. v. Architectural Co.*, 226 U. S. 276 (1912) the Court said in approving a state act affecting the remedy (p. 283):

“ As Chief Justice Marshall observed in *Ogden v. Saunders*, 12 Wheat. 213, 349, the obligation and the remedy originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a preexisting obligation. * * * ”

⁴ *Vance v. Vance*, 32 La. Ann. 186 (1882).

This Court affirmed the decree of the Louisiana Court remarking that the above quoted observations seem to us eminently just:

(iii) *Foreclosure of Pledge after debt barred by statute of limitations.* Further illustration of our proposition is found in a creditor's right to collect from pledged property the amount of an indebtedness, with interest, after a state statute of limitations has barred suit on the debt itself. Typical is *Hulbert v. Clark*, 128 N. Y. 295 (1891) where the foreclosure and application of pledged property on a debt barred by limitations of time was sanctioned by the New York Court of Appeals.² Anent Positionier's argument that limitations are "substantive" it is interesting to note the exact holding to the contrary by the highest court of the State³ where in the present litigation is proceeding (p. 297).

² *Fance v. Fance*, 108 U. S. 514, 517 (1883).

³ The rule in the *Hulbert* case has been applied many times by the New York Courts. See, e. g., *Maxwell v. Cottle*, 72 Hun 529 (1st Dep't, 1893) (attorney's lien on client's money enforceable after debt of client barred by limitations; reviewing many authorities); *Matter of Washburn's Will*, 21 N. Y. Supp. (2d) 469, aff'd, no op., 263 App. Div. 873 (Second Dep't, 1942) (remaindermen's interest in trust estate assigned as collateral for payment of notes could be foreclosed after notes barred by limitations); *Piper v. Haywood*, 71 Misc. 41 (1911) (corporate stock pledged to secure intestate's note could be foreclosed after right to proceed against estate barred by non-claim statute); *Watson v. Title Guarantee and Trust Co.*, 118 Misc. 795 (1922) (corporate stock pledged as collateral, pledgee may foreclose on lien after debt barred by limitations); *Reynolds v. Doyle*, 125 Misc. 778 (1923) (accommodation indorser released by failure to present demand note in reasonable time, denied right to replevin diamond stud pledged as collateral for the note); *Harvey v. Guaranty Trust Co.*, 134 Misc. 417 (1929) (indenture trustee held liable to bondholder for misconduct destroying value of property pledged for note after note barred by limitation).

Hulbert v. Clark represents the general rule. See *Notes: Bar of Statute of Limitations against debt secured by pledge as affecting rights and remedies in respect of the subject of the pledge*, 108 A. L. R. 430-436 (1936) (collecting many cases); *id.*, 137 A. L. R. 928-934 (1942) (supplemental note); cf. *Note: Applicability of proceeds of sale of collateral security to barred portion of debt secured*, 139 A. L. R. 478-480 (1942); *Jones, Collateral Securities* (3rd ed. 1942) §§ 581, 582.

"The Statute of Limitation does not after the prescribed period destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the Statute of Limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in *Campbell v. Holt* (115 U. S. 620): It was held in *Johnson v. Albany & Susquehanna R. R. Co.* (54 N. Y. 416), that the Statute of Limitations acts only upon the remedy; that it does not impair the obligation of a contract or pay a debt or produce a presumption of payment but that it is merely a statutory bar to a recovery; and so it was held in *Quantock v. England* (5 Burr 2628), and so it has ever since been held in the English courts. * * *

In *House v. Carr*, 185 N. Y. 453 (1906), the Court of Appeals held that no action could lie in equity to restrain a sale under a power of sale contained in a mortgage on the ground that the statute of limitations had run against the mortgage. The Court said:

"It is settled law * * * that equity will not set aside as a cloud upon title a lien outlawed by the Statute of Limitations * * * (456).

"It must be borne in mind that the Statute of Limitations in this state never pays for discharges a debt, but only affects the remedy. It would be within the constitutional power of the legislature to repeal the Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation. (*Campbell v. Holt*, 115 U. S. 620.) Therefore, though the statute may have barred one remedy on the debt, if there be another remedy not affected by the statute, or one to which a different limitation

applies, a creditor may enforce his claim through that remedy * * * (458). But assuming that the Statute of Limitations bars the right to exercise the power of sale, and * * * that the plaintiffs * * * is in the * * * position of being compelled to seek relief in a court of equity, nevertheless the court will require them, as a condition of relief, to do equity and pay the debt which they do not deny they owe * * * (458-459).

Petitioner must be aware of this decisional law of New York for it cites *Lightfoot v. Davis*, 198 N. Y. 261, which relies on *Hulbert v. Clark*, *supra*. And yet, in erecting its argument that "the statute of limitations (is) a part of substantive law" (*Brief*, p. 16) it relies on *Dupree v. Mansur*, 214 U. S. 161, which is discussed at length in its brief at pages 43-44. *That was a bill to quiet title to land in Texas*. "It is established law in Texas that when a debt is barred an action to foreclose a lien or mortgage given as security for it is barred also, (citing five Texas cases)" (p. 166). The Fifth Circuit Court of Appeals granted a decree of foreclosure asked in a cross bill by the holder of notes then barred by the Texas statute of limitations. This Court granted certiorari, and reversed, on the ground that:

"By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us that it should be governed by the decisions of the State where the land lies * * * (p. 167).

Elsewhere in the opinion (p. 167), HOLMES, J., speaking for the Court, further stated:

"If that (Texas) law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States

to say otherwise when sitting in equity any more than when sitting at law. It appears to us equally their duty when the local law decides that the words create a right, to take the measure of that right from the same source. The notes are barred as well in equity as at law."

Petitioner introduces its discussion of *Dupree v. Mansur* with the remark "that the question what lapse of time shall be deemed in Federal equity jurisdiction to be conclusive as against rights asserted in equity, has always been considered to be a substantive question." But *Dupree v. Mansur* was not primarily a question of the statute of limitations; it involved *rights in land*¹ because, under Texas law, the holder

¹ *Dupree v. Mansur* turns on an extremely narrow point which differentiates between the rights of the vendor and purchaser of notes given "for the price of land to which a vendor's lien is attached" (166). On the general rule Texas is in accord with *Hulbert v. Clark*. In *Central National Bank v. Latham & Co.*, 22 S.W. (2d) 765, 768 (Tex. Civ. App. 1929) the Court said:

"The fact that an action for the recovery of a debt is barred by the statute of limitation does not destroy the debt. The bar affects the remedy only. The right of the creditor to receive payment continues after the bar, and will support a new promise of payment or justify the sale of pledged property by the pledgee under power either express or implied, and the application of the proceeds of such sale to the discharge of such debt. In such cases the debtor cannot enjoin the sale without tendering payment of the debt, notwithstanding such bar (citing six Texas cases). While some of the cases cited involved sales of real estate under deeds of trust to satisfy barred obligations, the rule under consideration is the same in such cases as in the case of sale of pledged property under like conditions.

For a review of other Texas cases in accord see 103 A. L. R. 433, 435 and the authorities cited in note 3, p. 24, *supra*. That other courts view the *Dupree* case as we see it (it affects "rights in land") see *Gossett v. Fordyce Lumber Co.*, 181 Ark. 848, 853, 854, (1930). The special problem presented in the *Dupree* case is viewed by Texas courts as involving title to land. In *Cleveland St. Bk. v. Gardner*, 121 Tex. 580, 583 (1932) the Court said "The assignment by Gran-

(Continued on page 28)

of a note secured by realty had no right in the realty once the note was barred by the statute of limitations. *The contrary is the law in New York.* If the *Dupree* case had arisen in the State of New York, the result would have been an affirmance of the decree of foreclosure because, under *Hulbert v. Clark* and *House v. Carr*, the holder of notes secured by a lien on land may foreclose even after the note is barred by the Statute.

The *Dupree* case is obviously not a decision in Petitioner's favor. It is an application of the rule that interests in land are matters of substantive law which are always governed by the *lex loci*.¹ As a matter of fact, this Court, in *Campbell v. Holt*, *supra*, pointed out in sustaining the constitutionality of a Texas statute of limitation, as far as personal claims were concerned, that a different result would be required if, after a period of adverse possession, title to land had been acquired, and the Court said that if title to land were involved, it was extremely doubtful whether a state could constitutionally interfere with that title by extending the period of limitation. See *Campbell v. Holt*, *supra*, at page 625, *et passim*.

(iv) *Conflicts of laws.* It is the universal rule in conflicts of law cases that limitations of time fixed by statute

(Continued from page 27).

bury to the bank, of two of the purchase money note, which Cochran had executed did not effect a transfer to the bank of the superior legal title to the land covered by the deed from Granbury to Cochran. Said superior legal title remained in Granbury. When the bank (sued) Cochran, (it) was a mere lienholder, and held no title, either legal or equitable, to the land involved in the suit (citing *Stephens v. Mathews*, 69 Tex. 341, relied on by HOLMES, J. in *Dupree v. Mansur*, at 166.

¹ Similar considerations governed the decision in *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208 (1939), on which petitioner leans heavily (see Brief, pp. 23-25).

are procedural and not matters of substance.¹ Hence they are governed by the *lex fori*. The *Restatement* provides that a cause of action not barred by the limitations of the forum may be maintained even though barred in the state where it arose.² Conversely, it is provided that even though the action be not barred in the state of origin, it cannot be maintained if barred by the limitations of the forum.³ The instances when periods of time are held matters of substance illustrate the general rule that they are merely procedural. So, when a statutory right specifies as a condition thereof that action be taken within a fixed period, such action is a condition of the right, for the time limited is an integral part of the right itself.⁴ Thus, while the limitations of time in the Bankruptcy Act are superior as to state statutes of limitations,⁵ nevertheless the trustee is bound to comply with a condition in a state statute creating a right, if he desires to avail himself of that right. In New York, the right to share in a bank liquidation is conditioned on the filing of a claim within a fixed period. This has been held to apply to a trustee in bankruptcy, despite the limitations in the Act, since the state statute prescribed a condi-

¹ 3 Beale, *Treatise on the Conflict of Laws* (1935), § 603.1 *et seq.* ("That the statute of limitations of the forum is the applicable law of limitations is so well settled * * * as to be beyond dispute"); Story, *Conflict of Laws* (6th Ed., 1865), § 576 *et seq.* ("In regard to statutes of limitation or prescription of suits, and lapse of time, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits"); Dancy, *Conflict of Laws* (5th ed., 1932), p. 849 *et seq.*; 2 Wharton, *Conflicts of Laws* (3rd ed.), p. 1244, *et seq.*; Minor, *Conflicts of Laws* (1901) § 210; Goodrich, *Conflict of Laws*, 2nd ed., 1938, p. 201 *et seq.*

² Restatement of the Law: Conflicts of Laws, § 604.

³ Restatement of the Law: Conflicts of Laws, § 603.

⁴ *William Danzer Co. v. Gulf R. R.*, 268 U. S. 633 (1925); Restatement of the Law: Conflicts of Laws, § 605; cf. *Home Ins. Co. v. Dick*, 281 U. S. 397 (1930).

⁵ *Hastings v. H. M. Byllesby & Co.*, 293 N. Y. 413 (1944); *Collaghan v. Bailey*, 293 N. Y. 396 (1944).

tion which required compliance, and not a limitation of time inferior to the federal law.¹

(v) *Waiver of Statute.* Petitioner has no "substantive" right to plead the state statute of limitations as a defense. Under New York law a defendant may waive the statute.² Limitations, under New York practice, must be affirmatively pleaded³ as defensive matter, and if not so taken, the defense is waived.⁴ Clear it is, then, that the basic right sued on is not destroyed by the running of the time limited, for, if it were otherwise, then a complaint barred by the statute should be subject to attack for insufficiency, and a defendant could not waive the bar by failure in pleading. The rule is almost as old as the common law that a debt, barred by a statute of limitations, "revives" if the debtor merely promises to pay it.⁵

¹ *Matter of Bank of U. S. in Liquidation*, 269 N. Y. 578 (1935), remittitur amended; 271 N. Y. 660 (1936); Cert. den. sub. nom. *Quintal et al. v. Broderick, Supt. of Banks*, 299 U. S. 614 (1937).

² Ordinarily this is accomplished by a promise to pay after the statute has run. Such a promise alone is sufficient to destroy the defense of the statute. *Loring v. Blair*, 43 N. Y. 48 (1870); see *Peoples Trust Co. of Malone, N. Y. v. O'Neil*, 273 N. Y. 312 (1937). The *New York Civil-Practice Act*, § 59 (Clevenger, 1944), now provides that such a promise, to be effective, must be in writing.

³ *New York Civil-Practice Act* (Clevenger, 1944) §§ 30, 242; *Rules of Civil Practice*, Rule 107(6). The *Federal Rules of Civil Procedure*, Rule 12(h), are in accord.

⁴ See, e.g., *People v. Williamsburgh T. Pike and R. Co.*, 47 N. Y. 586, 591 (1872); The Federal rule is in accord. *Roe v. Sears, Roebuck & Co.*, 132 F. (2) 829 (C. C. A. 7th 1943), (per EVANS, C. J. "Defendant having failed to plead the statute of limitations, it was waived. Defendant's subsequent motion for a summary judgment did not revive a defense which had been waived. Rules of Civil Procedure, Rule 8; Rule 12b and h (* * *)").

⁵ Yet it should be noticed that while limitations as a defense may be waived under the Federal Rules (Rule 12(b)), insufficiency is not waived by failure to plead (Rule 12(a)).

⁶ *Quintack v. England*, 5 Burr 2628, 98 Eng. Rep. 382 (1770).

In explaining this, Lord Mansfield said:

"It is settled, that the Statute of Limitations does not destroy the debt: it only takes away the remedy. The debtor may either take advantage of the Statute of Limitations, if the debt be older than the time limited for bringing action; or he may waive this advantage: and, in honesty, he ought not to defend himself by such a plea. And the slightest word of acknowledgment will take it out of the statute. * * *"

(vi) *The Matter of Policy.* Petitioner asserts that the statute of limitations, although merely destroying "the remedy without impairing the right" nevertheless "remains a part of substantive law" * * * because it is rooted in sound and well-established public policy * * * (Brief, p. 16). Passing the inescapable contradiction appearing on the face of the argument (limitations affect "the remedy" yet are "substantive"), let us investigate the authority for the *policy* asserted. Since the litigation out of which the writ is drawn is proceeding in the State of New York, and since Petitioner seeks to import into federal equity the New York view of limitations *via* *Eric v. Tompkins*, it is obvious that it is New York's policy which is of any importance.

But Petitioner does not deem it necessary to refer to expressions of the New York courts as to the matter of the policy asserted—and contents itself with reference to the Institutes of Gaius, English statutes, observations of English courts, and this Court. The only New York cases *cited* (not quoted from) merely assert that statutes of limitation are matters of "repose" in which one of the considerations was the settlement of disputes while evidence was "readily obtainable". But in *Brooklyn Bank v. Burdett*,

197 N. Y. 210, 227 (where the matter of "repose" was asserted) the issue was whether the sale of collateral and application of the proceeds to defendant's debt tolled the statute. The trial court held it did; the Appellate Division (five Justices) agreed; the Court of Appeals reversed (4:3) over a dissent which was "unable to concur in the opinion and the conclusions" of the majority. It should be noted, however, that the majority opinion cited and approved of the doctrine contained in *Hulbert v. Clark* (at p. 226).

In *Schmidt v. Merchant's Despatch Trans. Co.*, 270 N. Y. 287, the Court held that an action for negligence due to the inhaling of dust which resulted in pneumoconiosis was barred by a three year statute. *But*, it modified a judgment of dismissal as to all of plaintiff's causes of action by asserting that the casting of the claim into one for damages for failure to obey a statute for safe appliances was governed by the six year statute,—after pointing out that for *all* the causes of action (the four barred and the one not barred) there was "only a single wrong for which there may be but one recovery" (299).

Thus the *result* of the decision was to *allow* the plaintiff to sue and recover all that he ever could recover and shows a studied effort to avoid the shorter, and apply the longer, period of limitations. It was in connection with the discussion of the shorter limitation that the Court observed that limitations "at times, * * * may bar * * * a just claim" and went on to place on the legislature the onus for finding that "such occasional hardship is outweighed by the advantage of outlawing stale claims * * *" (302).

These observations, made so haltingly and apologetically, did not reflect, obviously, the Court's view of the policy of statutes of limitation; that was expressed in the clearest fashion in *Hulbert v. Clark* and *House v. Carr*—

never repudiated—with the obvious indication that any avoidance of the statute will be eagerly approved by the Court (see pp. 24-26, *supra*).

Petitioner can get no comfort from the implied indictment contained in the word "stale". Examination of the New York law will show that if a defendant departs from the state *before* the statute has run and returns *thereafter*, an action will lie. The period between accrual of cause of action and suit may be far longer than the ordinary statutory period. To assert "staleness" in discussing policy is to rely on a bromide whose content will not, thus, withstand analysis. The cases on "absence and nonresidence" as extending the period of limitation are collected in 23 Abbott's New York Digest, pp. 395-402; also in 5 Abbott's New York Digest, 1944 Cum. Supp., pp. 869-871 (there are a goodly number). Indeed, there is an express statutory provision that:

"If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action" (New York Civil Practice Act (Clevenger 1944) § 19).

But non-residence is not the only doctrinal evidence of New York's policy as to limitations. We have already noted that the statute may be waived even after it has barred the claim by a naked promise to pay and have shown that the defense is so disfavored that it will be waived if not affirmatively pleaded. It is also inapplicable, in certain cases, to counterclaims against which the statute has run. The Appel-

tate Division recently explained this doctrine as follows [*President and Directors of the Manhattan Co. v. Cochea*, 256 App. Div. 560, 564 (1939)]:

* * * There are cases in which it has been held that where the cause of action and the counterclaim together constitute the several parts of an entire transaction the counterclaim may be interposed even though the statute has run against it. Thus, in *Herbert v. Day* (33 Hun, 461), the plaintiff sued for the value of work done in constructing a cellar, and the defendant was permitted to counterclaim¹ for breach of a covenant in the contract to make the cellar watertight. In *Maders v. Lawrence* (49 Hun, 360) the plaintiff sued on a note given in payment for a horse, and the counterclaim was for breach of a warranty that the horse was sound¹ * * *

Under a New York statute regulating the liquidation of banking organizations it is required that, before any suit will lie to share in the liquidation, a proof of claim must be filed with the liquidator within a specified time and this fact must be alleged and proved in the action (*Banking Law*, §625). The action is not maintainable if the statute is not satisfied in this regard [see, e. g., *Zuroff v. Westchester Trust Co.*, 273 N. Y. 200 (1937)]. Nevertheless, a defendant who had not complied with the statute as to a claim against the bank in liquidation for legal services was allowed to use that claim as a *set-off* in defending against an admitted liability to the bank on a note [*Long Beach Trust Co. v. Warsaw*, 264 N. Y. 331 (1934)]. "This is a case," said the Court, "where the right to sue on a debt and the right to use the debt as an offset are not equivalent. The statute * * * is not to be extended beyond its terms. A set-off is

¹ The statute had run on the counterclaims in each instance. See also, *Holins v. Otis*, 5 Lafr. (N. Y.) 137 (Gen. T. 4th Dept. 1877 (mutual account)).

not an action. The statute refers only to actions "instituted" against the bank" (at p. 334).

These are not the only inroads into the statute of limitations in New York. There are others. But enough has been shown to substantiate our claim that, as far as the New York courts are concerned, the defense of the statute is only a matter affecting the remedy, and definitely is not, as Petitioner claims, a "matter of substance."

Petitioner's argument that the defense of the statute of limitations is a "substantive" matter is thus demonstrably unsound. The state may destroy that defense, and yet no constitutional objection can be made thereto; under the decisional law of New York limitations merely affect the remedy—the basic right is unaffected and may be enforced against pledged property after the statute has run; it may be enforced if the defendant does not plead the statute. It may be enforced if the defendant has, in writing, waived the statute and made a new naked promise to pay the debt. Conflicts of law cases provide an additional test: *limitations are not substantive matters*; the contrary result obtains only in those limited instances where either the time fixed for the commencement of suit is a condition of the right created by the same statute, or where interests in realty are involved, as in the *Dupree* and *Dunlap* cases, *supra*, pages 26, 28. No such situations or statutes are involved here.

POINT IV.

Since the decision in *Erie v. Tompkins* this Court has reaffirmed the doctrine that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit.

We have already noted that, prior to the decision in *Erie v. Tompkins*, this Court drew a distinction between

state statutes which impaired, abridged or enlarged equitable remedies and state statutes which established new equitable rights. The Court refused to permit the former class of statutes to have any effect on the equitable jurisdiction of the federal courts,¹ while permitting the latter group (those creating new "rights") to be followed, applied and given effect by the federal chancellor.²

This distinction was drawn, followed and applied (a) before 1842³ when this Court adhered to the doctrine now established in *Erie v. Tompkins* in cases at common law; (b) from 1842 (the date of the decision in *Swift v. Tyson*) to 1938⁴ (the date of the decision in *Erie v. Tompkins*); and (c) since the decision in *Erie v. Tompkins* in 1938. Thus from the very beginning of the federal system up to the present date, whether *Swift v. Tyson* or *Erie v. Tompkins* was the rule in trials at common law, this Court has always adhered to the principle that the equity jurisdiction of the federal courts could not be trenched on or enlarged by state legislation. And whether *Swift v. Tyson* or *Erie v. Tompkins* was the rule, this Court has always, pursuant to the Judiciary Act of 1789, recognized state statutes as rules for decision in federal courts in trials at common law.

¹ See, e. g., *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491 (1923).

² See, e. g., *Scott v. Neely*, 140 U. S. 106, 109 (1891). See Comment, *The Effect of State Statutes on Equity Jurisdiction in the Federal Courts*, 33 Yale L. J. 193 (1923). Petitioner's attack on the equitable remedies doctrine is prefaced with the remark (*Brief*, p. 29) that generally such part of the Federal equity jurisdiction *relates to practice in equity* has been held independent of State decision and legislation * * *. Laches, of course, "relates to practice in equity" (see, e. g., *Rude &c.*). In view of this, Petitioner's lengthy analysis of the cases merely demonstrates a flexible use of the word "jurisdiction" and leaves its argument without point.

³ *Robinson v. Campbell*, 3 Wheat. 212 (1818).

⁴ *Pusey & Jones v. Hanssen*, 261 U. S. 491 (1923).

⁵ *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1941).

At no time from the beginning of the federal system was there any difference, in the Court's view, of the scope and effect of state statutes in federal courts. They were given effect as rules of decision in cases at common law—but in equity, only if they created new equitable “rights”. If the state statute in question interfered with the federal chancellor's jurisdiction as to *remedy*, it was struck down.

Nothing in *Erie v. Tompkins* overturns this settled rule. Indeed, *Erie v. Tompkins* is merely an extension of *Swift v. Tyson* to include state decisional law in addition to state statutes as rules of decision in trials at common law in the federal courts. “Hitherto . . . counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts . . .” [*Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 209 (1938)]. Under that view it seems clear that all that was accomplished by *Erie v. Tompkins* was to extend to state decisional law the distinction already established prior thereto with respect to state statutory enactments. To sum up: before *Erie v. Tompkins*, a state statute was given effect in federal equity only if it established new “rights”—it was struck down if it either added, to or subtracted from the *remedial* jurisdiction of the federal chancellor. *Erie v. Tompkins* does not destroy this distinction—it merely carries it farther and extends it to include state decisional law.

That we are sound in our analysis is indicated by *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1941), a decision which, as its date indicates, was rendered after *Erie v. Tompkins*. In the *Kelleam* case an Oklahoma statute permitted a surety to “obtain indemnity against its principal even before the debt is due and receive the protection of various provisional remedies” (at pp. 381, 382). Acting under this state procedure and invoking federal jurisdiction on diversity grounds, the Casualty Company sued in a

federal court of equity, seeking exoneration on its bond and asking for the appointment of a receiver to protect certain property. This relief was granted by the District Court, and affirmed by the Court of Appeals. This Court granted certiorari (311 U. S. 627), and reversed. It stated that even if the remedy granted below were sanctioned by state statute,

... a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute. *Pusey & Jones Co. v. Hanssen, supra*, * * * (at p. 382).

Clearly, the decision in the *Kellean* case, as indicated by the quotation from *Pusey & Jones v. Hanssen*, is a recognition that today, after the decision in *Erie v. Tompkins*, this Court will refuse to permit the federal jurisdiction in equity to be altered even though that alteration is authorized by a state statute in force in the state where the federal court sits. If *Erie v. Tompkins* is to be construed as drawing into federal equity, *via* the Rules of Decision Act, local legislation, then the practice in the *Kellean* case followed by the District Court should have been approved. The reversal by this Court is a clear indication that *Erie v. Tompkins* does not have that effect.

If the reversal in the *Kellean* case was based entirely on grounds independent of the state statute, certainly this Court would have been impelled so to explain and show that, despite the applicability of the state practice in federal equity *via* *Erie v. Tompkins*, nevertheless reversal was required because of other reasons. The fact that, in revers-

¹ See Note, *State Limitations on Federal Equity Jurisdiction*, 50 Yale L. J. 1094 (1941) ("The implication in the *Kellean* case * * * is that the *Tompkins* rule will not be given * * * effect in all situations. Under this holding, the determination in the *Pusey & Jones* case that statutes authorizing the appointment of receivers merely create remedies affecting equitable procedure seemingly will control in the federal courts * * *") (1099).

ing, this Court did not mention *Eric v. Tompkins*, or the doctrine embodied therein, but, instead, quoted from *Pusey v. Hanssen*, is a clear indication that *Eric v. Tompkins* does not draw into federal equity state statutes enlarging, or impairing, the equity jurisdiction.

Petitioner argues that the doctrine enunciated in the *Kirby* case was swept away in *Eric v. Tompkins*. But that contention is demonstrably unsound: *Eric v. Tompkins* merely added to the content of the 34th article of the Judiciary Act of 1789 the decisional law of the several states. At no time prior to the decision of that case was there any question as to the applicability of state statutes of limitation in trials at common law. This was so in cases decided prior to *Swift v. Tyson*.¹ It was so held in cases after²

¹ *Walden v. The Heirs of Gratz*, 1 Wheat. 292 (1816); *Patton v. Lessee v. Easton*, 1 Wheat. 476 (1816). cf. the statement of CATRON, J. in *Bank v. Dalton*, 9 Howard 522 (1850) at p. 527. "That acts of limitation furnish rules of decision, and are equally binding on the federal courts as they are on state courts, is not open to controversy * * *"

² See, e. g., *Michigan Ins. Bank v. Eldred*, 130 U. S. 693 (1889). (per GRAY, J.: "But it had been settled by a series of decisions of this court that statutes of limitations, even in personal actions, including actions on judgments, were laws of the several States which, except where the constitution, treaties or statutes of the United States otherwise required or provided, must, under the Judiciary Act of September 24, 1789, c. 20, § 34, be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92; Rev. Stat. § 721; *Beatty v. Burns*, 8 Cranch, 98; *McCluny v. Silliman*, 3 Pet. 270; *Alabama Bank v. Dalton*, 9 How. 522; *Bacon v. Howard*, 20 How. 22; *Amey v. Dubuque*, 98 U. S. 470. Statutes of limitation of personal actions are laws affecting remedies only, and not rights, as is clearly shown by the decisions that the only statutes of limitations applicable to such an action are the statutes of the State where the action is brought, and not those of the State where the cause of action arose. *McElmoyle v. Cohen*, 13 Pet. 312; *Torensen v. Jemison*, 9 How. 407; *Walsh v. Mayer*, 111 U. S. 31. It was thus established that statutes of limitations of the State governed personal actions in the courts of the United States. Otherwise, in the absence of Congressional legislation, there would be no limitation of the time of bringing any personal action in a court of the United States."

Swift v. Tysons. Indeed, so far as state statutes of limitation were concerned, the doctrine of *Swift v. Tyson* had no application. By a long series of cases this Court has, with respect to such statutes, always followed the decisional law of the several states in law actions.¹

In *Metcalf v. Watertown*, 153 U. S. 671 (1894), Chief Justice FULLER speaking for the Court explained the effect of the Rules of Decision Act on state statutes of limitations in actions at law as follows (at p. 673):

“ * * * from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court, as rules of decision in the courts of the United States. * * * ”

In *Bauserman v. Blunt*, 147 U. S. 647 (1893) the Court said (per GRAY, J., at p. 652):

“ In a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that ‘the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’ Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court. *Higginson v. Mein*, 4 Cranch, 415, 419, 420; *Shelby v. Guy*, 11 Wheat. 361, 367; *Bell v. Morrison*, 1 Pet. 351, 360; *Henderson v. Griffin*, 5 Pet. 151; *Green v. Neal*,

¹ See, e. g., *Bauserman v. Blunt*, 147 U. S. 647 (1893) and cases there collected and discussed.

6 Pet. 291, 297-300; *McElmoyle v. Cohen*, 15 Pet. 312, 327; *Harpending v. Dutch Church*, 16 Pet. 455, 493; *Leffingwell v. Warren*, 2 Black, 599; *Sohn v. Water-son*, 17 Wall. 596, 600; *Tioga Railroad v. Blossburg & Corning Railroad*, 20 Wall. 137; *Kibbe v. Ditto*, 93 U. S. 674; *Davie v. Briggs*, 97 U. S. 628, 637; *Amy v. Dubuque*, 98 U. S. 470; *Mills v. Scott*, 99 U. S. 25, 28; *Moore v. National Bank*, 104 U. S. 625; *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696; *Penn-
field v. Chesapeake, etc., Railroad*, 134 U. S. 351; *Barnes v. Oelrichs*, 138 U. S. 529.

"In *Patten v. Easton*, 1 Wheat. 476, 482, and again in *Powell v. Harman*, 2 Pet. 241, this court had con-
strued a Tennessee statute of limitations of real
actions, in accordance with decisions of the Supreme
Court of the State, made since the first of these cases
was certified up to this court, and supposed to have
settled the construction of the statute. Yet in *Green
v. Neal*, 6 Pet. 291, a judgment of the Circuit Court of
the United States, which had held itself bound by
those cases in this court, was reversed, because of
more recent decisions of the state court, establishing
the opposite construction.

"In *Leffingwell v. Warren*, 2 Black, 599, 603, Mr.
Justice Swayne, speaking for the court, laid down,
and supported by references to earlier decisions, the
following propositions: 'The courts of the United
States, in the absence of legislation upon the subject
by Congress, recognize the statutes of limitations of
the several States, and give them the same construc-
tion and effect which are given by the local tribunals.
They are a rule of decision under the 34th section of
the Judicial Act of 1789. The construction given to
a statute of a State by the highest judicial tribunal
of such State is regarded as a part of the statute, and
is as binding upon the courts of the United States as
the text. If the highest judicial tribunal of a State
adopt new views as to the proper construction of such

a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' "

And in 1941, after the decision in *Erie v. Tompkins*, this Court explained, again, that:

" * * * even before the decision in *Erie R. Co. v. Tompkins* * * * the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts * * * "

Nevertheless, while state limitations, as construed by state decisional law, have been invariably applied under the Rules of Decision Act to trials at law in federal courts, they have not been recognized in federal equity.

As this Court has clearly said, it was not the doctrine of *Swift v. Tyson* which denied the effect of state limitations in federal equity, but an independent doctrine designed to afford a uniform jurisdiction in equity in the federal courts. Accordingly, *Erie v. Tompkins*, designed to annul the restricted interpretation of the Rules of Decision Act encompassed in *Swift v. Tyson*, in cases other than those involving the question of the statute of limitations, did not reach out to override the many authorities following *Robinson v. Campbell* and establishing the independence of a federal equity jurisdiction.

¹ This quotation is from *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 634 (1941). The opinion of the court goes on to recall to the Bar the decision in *Bauserman v. Bluff* and quotes from *Leffingwell v. Warren* which GRAY, J., cited and discussed in the *Bauserman* case. *Moore v. Illinois Central R. Co.*, *supra*, was an action at law for damages for wrongful discharge. This Court granted certiorari (341 U. S. 643) to review a judgment in which the Fifth Circuit Court of Appeals "applied a Mississippi statute of limitations contrary to the Mississippi Supreme Court's application of the same statute to the same plea in the same case" (631) and reversed "for failure to follow state law on the state statute of limitations" (636).

To follow Petitioner to the logical bounds of its argument would require the enunciation of a doctrine that jurisdiction of federal courts of equity is determined, not by "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries" (*Atlas Insurance Co. v. Southern Inc.*, 306 U. S. 563, 568), but by the accidents of local statute.¹

To illustrate how far afield Petitioner would lead this Court, let us see what his argument would mean. It would mean that if New York abolished specific performance, there would be no remedy of specific performance in the federal equity court. It would mean that if New York abolished bills for an account, or creditors' bills, or bills for reformation or rescission, each one of these equitable remedies would atrophy in the federal court. In short, Petitioner's argument would require the abolition of all equitable remedies in a federal court if the state in which it was sitting abolished these remedies; and it would require that the content and even the existence of the federal jurisdiction in equity expressly conferred by the Constitution be determined and measured by grace of the law of the several states which happens to be in effect at any particular time.²

¹ In *Ridings v. Johnson*, 128 U. S. 212 (1888), the Court said (at p. 217): "And it is settled law that the courts of the United States do not lose any of their equitable jurisdiction in those States where no such courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action. * * * We have distinctly held that the equity jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the different States of the union. *Payne v. Hook*, 7 Wall. 425. * * *

² This conception by Petitioner is fundamental to its argument. There is constant insistence on it, emphasized (*Brief*, p. 47) by the concluding thought that "A Federal court of equity cannot grant relief of a kind other than that granted by the State courts, on the same facts, without re-establishing the dual legal system which existed before 1938." (The emphasis is not ours.)

But that is the precise reason why this Court from the earliest beginnings of the federal system refused to measure federal equity by local practice.

There is no act of Congress nor rule of Court requiring the contraction of jurisdiction sponsored by Petitioner unless it be the Rules of Decision Act. Conceding, *arguendo*, that the Rules of Decision Act reaches matters of "substantive" law in federal equity, nevertheless statutes of limitation are not substantive, and only affect the scope of the remedy. It is, therefore, clear that to give *Eric R. Co. v. Tompkins* its broadest possible scope would not introduce into federal chancery state limitations of time and destroy, to that extent, the federal court's jurisdiction.

But over and above this we believe that the Rules of Decision Act was never intended to apply in equity cases. This Court has recently so expressed itself in *Russell v. Todd*, 309 U. S. 280, 287 (1940). That was an action to enforce in equity the liability of stockholders of a joint stock land bank created by Congressional Act. In New York where the case arose, there existed a ten-year statute applicable in certain instances to equitable actions, and a three-year statute with respect to stock assessment suits. The liability asserted in *Russell v. Todd* had accrued more than three but less than ten years prior to suit. The District Court and the Court of Appeals refused to apply the bar of the three-year statute and this Court refused to reverse.

The doctrine of laches was not involved. We deem it significant, however, that the Court should have made special reference to the application in equity suits of the Rules of Decision Act. It said:

"The suit being in equity, brought in a federal district court, the question decisive of this case is what lapse of time will bar recovery in the absence

of an applicable federal statute of limitations. The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U. S. C. 725, directing that the 'laws of the several states' 'shall be regarded as rules of decision' in the courts of the United States, applies only to the rules of decision in 'trials at common law' in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. *Eric R. Co. v. Tompkins*, 304 U. S. 64.

Conclusion.

Beginning with *Robinson v. Campbell* the Court has consistently struck down attempts to interfere with federal equity power *via* state legislative action. This course of judicial action had for its *purpose* the maintenance of an untrammelled federal equity jurisprudence. Its *result* is to protect and make available all the equitable remedies developed in, and inherited from, the English Court of Chancery. It has become known and described as the "equitable remedies" doctrine. Statutes of limitation, an abridgment of the *legal* remedy, would, if their application in equity were required in all cases, equally result in an abridgment of the *equitable* remedy otherwise available if laches were continued as the time-scope measure of the equitable remedy.

The Rules of Decision Act by its terms applied only in law trials. The utmost effect that Petitioner claims for *Eric v. Tompkins* in equity is with respect to matters of "substance." But statutes of limitation, and the equitable analogue of laches, are, both historically and analytically, matters affecting only the remedy. Accordingly, *Eric R. Co. v. Tompkins*, does not affect or limit the equitable remedies doctrine. *Kirby v. Lake Shore & M. R. R. Co.* therefore, remains unimpaired as a decision squarely answering in the negative the question presented by the writ.

*The order and judgment of the Second Circuit
Court of Appeals should be affirmed.*

Respectfully submitted,

CARL J. AUSTRIAN,
Attorney for Amicus Curiae

SAUL J. LANCE,
ISADORE H. COHEN,
© *Of Counsel.*

New York, N. Y., December 29, 1944.

FILE COPY



No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1944

GUARANTY TRUST COMPANY OF NEW YORK,
PETITIONER

v.

GRACE W. YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION AMICUS CURIAE

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BRIEF FOR THE SECURITIES AND EXCHANGE
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This controversy is between private parties and does not involve any statute administered by the Securities and Exchange Commission. Nevertheless, a decision by this Court on the question presented herein may have an important effect upon the administration and enforcement of certain statutes in connection with which the Commission has administrative and advisory

responsibilities. Accordingly, although it has not previously participated in these proceedings, the Securities and Exchange Commission submits this brief as *amicus curiae*, in support of the decision below.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York granting summary judgment to the petitioner as defendant below (R. 23-25) has not been reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit, as revised following reconsideration, reversing the district court, is reported in 143 F. (2d) 503.

JURISDICTION

The circuit court of appeals reversed the judgment of the district court on March 2, 1944. Rehearing was denied and a revised opinion was filed by the court on May 25, 1944 (R. 55). The order for mandate was entered June 29, 1944. A petition for a writ of certiorari was filed July 17, 1944, and granted October 9, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. A. § 347 (a)).

QUESTION PRESENTED

The Court has granted certiorari only with respect to the first question presented by the petition for the writ, namely:

"In an equity case in a Federal court based on diversity of citizenship, is the court bound by the State statute of limitations held to govern like cases by the State courts?"

STATEMENT

We believe it unnecessary to restate the complicated facts of this case. The facts set forth in the briefs of petitioner and respondent constitute a sufficient factual basis for an understanding of the Commission's views. It may be desirable, however, to note here the following facts:

The plaintiff (York), a holder of certain notes issued in 1930 by Van Sweringen Corporation, brought this suit against petitioner, the trustee of the indenture under which the notes were issued, for alleged breach of duty in 1931 when the petitioner-trustee failed to cause the liquidation of the debtor for the benefit of noteholders, allegedly because it had a private interest conflicting with the interests of its *cestuis*. The present action, which was brought in the federal district court on the basis of diversity of citizenship, was not instituted until 1942. It was alleged, however, that the plaintiff did not learn of petitioner's breach of duty until 1940 because of the latter's fraudulent concealment of facts and that since that time the plaintiff has not slept on her

rights but, rather, has taken such action as would rebut laches.

On motion of the defendant-trustee, the district court entered summary judgment for the defendant on the pleadings and affidavits. The circuit court of appeals reversed on appeal. The court remanded the case for trial and held that the issues of fact should be resolved on the basis of evidence to be presented to the trial court. On the basis of the facts before it on the pleadings, however, the court held that the trust indenture had imposed upon petitioner the duties of an express trustee, that the petitioner had violated those duties with resulting damage to the plaintiff and, finally, that the New York statutes of limitations did not effectually bar this action since, under the circumstances of this case, a federal court of equity was not bound to, and would not, apply the New York limitation statutes. This latter holding is the only issue presented on certiorari.

The petitioner argued below that the New York statutes of limitations as construed by the New York courts should be applied in this case; that this action, if brought in a New York state court, could have been brought at law; that it is therefore barred by the New York 6-year statute (Civil Practice Act, Section 48 (3), as it stood prior to September 1, 1936) relating to such suits; that, if it be considered as being exclusively within the

equity jurisdiction, it is nevertheless barred by the 10-year provision of Section 53 of that act which the New York courts have held applicable to equity suits of that kind; that the New York courts have decided that, under Section 53, the statute is not tolled *even if, because of defendant's misconduct, plaintiff was in ignorance of his rights until after the lapse of the 10 years*; that the only provision of the New York statute which makes allowance for such ignorance is subdivision of section 48 which relates solely to "an action to procure a judgment on the ground of fraud," and that the New York courts have interpreted that section to apply exclusively to actions for deceit and the like.

In short, petitioner contended that, under New York law and therefore in a federal court sitting in New York, a suit by a beneficiary against a trustee for breach of trust is barred at least after 10 years (unless it is the equivalent of an action for deceit) regardless of the fact that, because of the trustee's inequitable conduct, the beneficiary was ignorant of the cause of action until after the fixed statutory period.

Assuming, *arguendo*, that petitioner's interpretation of the New York decisions was correct, the circuit court of appeals, one judge dissenting, rejected the petitioner's contention and held that:

"While we are bound by the interpretation which New York decisions give to the

trust indenture, we are not required to apply the New York statute of limitations if there are strong countervailing equitable considerations. On the facts now before us, we cannot say that defendant's conduct, which apparently led to plaintiff's ignorance of her rights, was not clearly 'inequitable.'

"We conclude, then, that we cannot sustain the summary judgment on the ground that the action was barred by limitations or laches." (143 F. (2) 503 at 528).

ARGUMENT

~~THE COURT BELOW PROPERLY HELD THAT A FEDERAL COURT OF EQUITY IS NOT BOUND TO APPLY A STATE LIMITATION STATUTE WHERE IT CONFLICTS WITH EQUITABLE PRINCIPLES~~

I

In refusing to apply the New York statute of limitations the Circuit Court of Appeals stated that the application of that statute under the facts presented would be inequitable and that federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they would lead to an inequitable result. The inequity which the court found was that the local statute was applicable even though the plaintiff's ignorance of his rights was caused by inequitable conduct of the defendant.

The decision below is an application of the principle, almost as old as the federal courts,¹ that equitable remedies applied in the federal courts are not required to be identical with those applied in the courts of the state in which the federal court is located. This doctrine is one which precludes the creation of substantive federal law with *Swift v. Tyson*, 16 Pet. 1. We believe it also has survived the abolition of the doctrine of *Swift v. Tyson* by *Eric Railroad Co. v. Tompkins*, 304 U. S. 64. We believe that the issue before this Court is whether it shall now, for the first time, extend the doctrine of *Eric Railroad v. Tompkins* so as to overrule the long line of cases dealing with equitable remedies and compel federal courts to follow state practice on such matters, at least in so far as the statute of limitations is concerned, without regard to their own views as to the requirements of equity and fairness. The opinion of Judge Frank in the court below contains an analysis of the doctrine of equitable remedies and its relation to decisions both antedating *Swift v. Tyson* and succeeding *Eric Railroad v. Tompkins*. Since we agree with Judge Frank's comprehensive analysis of the law, we shall not elaborate on it. We do, however, wish to set forth in some detail the reasons why we believe it undesirable to extend the doctrine of *Eric Railroad v. Tomp-*

¹ *Robinson v. Campbell*, 3 Wheat. 212, and cases cited in note 28 of Judge Frank's opinion, at p. 522 of 143 F. (2d).

kings in the present type of case in the light of the national policies involved.

The question here depends entirely on judicial self-limitation. No federal statute requires the application in equity of the local period of limitations. There is no constitutional bar to the power of the federal courts to apply equitable considerations in deciding whether access to a court of equity should be deemed foreclosed. We do not argue that federal courts of equity should not, where it seems equitable to do so, apply the statutes of limitations of the various states as a measure of laches. What we do argue is that when the application of the state rule would result in inequity and reward fraud and misconduct, especially when in contravention of an established national policy, the federal courts should recognize their reserved right to withhold the application of such statutes and to apply instead principles of fairness and equity.

II

The reasons of policy which originally motivated the reservation of independent appraisal of the appropriate equitable remedies by the federal courts have not diminished with the passage of time. In fact, the type of diversity cases where there are most likely to be equitable grounds for not following arbitrary time limits upon the bringing of actions has become to an increasing

extent litigation which involves a cause of action on behalf of a class of investors scattered in many states and which therefore is of an essentially interstate character.

This case is based upon a charge of breach of duty by a corporate fiduciary. Such litigation challenging mismanagement by directors of corporations as well as misconduct by affiliated bankers and trustees frequently arises, as in this case, after recent discovery of corporate abuse which the management has concealed over a period of years. Such discovery usually results from some crisis in the affairs of the company, such as bankruptcy, and the resulting investigations launched under judicial or administrative supervision.²

² When a corporation gets into financial difficulties, security holders may be expected to inquire as to the extent, if any, to which management may have caused or contributed to the failure. As we note below, such inquiry becomes mandatory under Chapter X of the Bankruptcy Act. While the company is operating successfully, acts of the management, interested bankers, indenture trustees and others are not likely to be questioned. Such causes of action will not ordinarily be revealed in the routine disclosures of annual statements. In fact their very nature is such that they are likely to be purposely concealed and there may be no means of making the thorough investigation necessary to expose them, and no one to raise the question.

When reorganization or bankruptcy takes place, the necessary interest of security holders is likely to be present. They are then willing and ready to make charges against the management and the bankers and the means of thorough investigation are usually available at that time. Similarly, dis-

The causes of action based on corporate mismanagement which typically arise in the federal courts concern corporations of nation-wide importance whose securities have been widely distributed through the underwriting mechanism and are held throughout the country. The crux of the charge in the present litigation is that the petitioner failed in its obligation as trustee under an indenture for the benefit of noteholders, many of whom, like the plaintiff, were residents of states other than New York and were scattered throughout the United States. The cause of action depends on numerous financial transactions involving corporations and financial institutions whose primary place of business were in Cleveland and New York but which dealt with public investors throughout the country.

The existence of a cause of action on behalf of such investors against those who owe them a fiduciary duty is a matter of national concern, reclosure of facts which had been concealed by the corporate managers frequently results during the course of administration of various regulatory statutes, such as those administered by the Securities and Exchange Commission. Congressional investigations of major financial scandals including various aspects of Van Sweringen's financing, have likewise uncovered theretofore concealed acts of mismanagement. See S. Rep. 714, 77th Cong., 1st sess., Additional Report of Committee on Interstate Commerce pursuant to S. Res. 74, 74th Cong., pts. 1-4. See also Stock Exchange Practices, Hearings before Committee on Banking and Currency on S. Res. 84, 72d Cong. and S. Res. 56 and 97, 73d Cong. Cf. *Overfield v. Pennroad Corp.* (C. C. A. 3d), December 28, 1944, pp. 16, 72.

flected in a series of Acts administered by the Securities and Exchange Commission, which contain pertinent declarations of policy. Section 302 of the Trust Indenture Act (15 U. S. C. § 77bbb) contains a declaration of the necessity in the national public interest for regulation of trustees under indentures securing evidences of indebtedness. Section 2 of the Securities Exchange Act of 1934 (15 U. S. C. § 78b) recites the effect of trading in securities upon the national economy and upon the interest of investors. Section 1 of the Public Utility Holding Company Act (15 U. S. C. § 79a) describes the evils to which holders of securities in public utility holding companies have been subjected and the wide-spread effect of such evils upon the national economy. Similarly, Section 1 of the Investment Company Act (15 U. S. C. § 80a-1) deals with the need for regulation of investment companies in the interest of investors in the securities of such companies and the effect of detrimental practices of such companies upon interstate commerce and the national economy.

In recognition of the national public interest described in these declarations, specific measures have been enacted by Congress, which show particular concern that there shall be protection of investors against fraud, overreaching, and inequitable conduct on the part of officers, directors, trustees and other affiliated interests who occupy

inside positions in enterprises in which public funds have been placed.

Chapter X of the Bankruptcy Act provides for the appointment of disinterested and independent trustees in corporate reorganizations (11 U. S. C. § 556) and expressly places upon such trustees the obligation to investigate causes of action against the management and affiliated interests and to bring suit on such causes of action (11 U. S. C. § 567). Section 167 (3) of the Act provides

See, for example, Securities Exchange Act, § 16 (transactions of officers, directors, and principal stockholders); Securities Act, Schedule "A" (22) (disclosure of transactions of officers, directors or principal stockholder with the company); Investment Company Act, § 17 (transactions of certain affiliated persons), § 36 (injunctions against gross abuse of trust by various fiduciaries); Trust Indenture Act, § 310 (b) (prohibition against conflicting interests in indenture, ~~trustee~~); Public Utility Holding Company Act, §§ 2 (a) (1), and 12 (f) (control of transactions of affiliates).

The recommendation of the Securities and Exchange Commission which led to enactment of Chapter X stated on this point:

"In every case a qualified and disinterested trustee should be appointed * * * The appointment of an independent trustee is designed * * * to make it impossible to leave these estates in the hands of those whose mismanagement may have given rise to the need for reorganization * * *

The independent trustee should be authorized and directed to make an investigation in every case of the condition of the company and of the events antedating the failure, with the three-fold objective * * * (3) of disclosing and diligently pursuing corporate assets in the form of claims against directors, officers, their affiliated interests and others who may have misused corporate control for their personal benefit." / *S. E. C. Report on the Study and Investiga*

that the trustee "shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate." This provision "insures prosecution of all causes of action," which "in some cases add to the assets of corporations in reorganization." S. Rep. 1916, 75th Cong., 3d Sess. (1938) p. 29.

In the light of this national policy for the protection of investors and for the realization of their just claims against corporate insiders whose misconduct has injured them, it is highly ques-

tion of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, pt. 1 (1937) pp. 898-899. Reference to these recommendations is made in S. Rep. No. 1916, 75th Cong., 3d Sess. (1938), p. 20.

So important is this aspect of the administration of the estate that Section 216-(13), 11 U. S. C. § 616 (13), makes it mandatory for the plan to provide for the retention and continued enforcement by the disinterested trustee of all claims not yet settled or adjusted. "Claims retained may be enforced, if necessary, even after consummation of the reorganization." S. Rep. No. 1916, 75th Cong., 3d Sess. (1938) p. 35.

This Court adverted to these provisions in its recent decision in *Brown v. Gerdes*, 321 U. S. 178, where the Court spoke of "the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 22; H. Rep. No. 1409 [75th Cong., 1st Sess.], pp. 42-44)" (321 U. S. at 182). The reorganization proceedings for Reynolds Investing Company, out of which that case arose, illustrate the importance of these provisions. Investigation in that case resulted in judgments for millions of dollars against former officials of the investment company for mismanagement, and the collection of substantial portions of the judgments.

tionable whether federal courts of equity are justified in subjecting themselves, without reference to the effect upon national policy, to the statutes of individual states which may withhold the aid of their courts from the enforcement of admittedly valid causes of action without regard to special equitable considerations bearing upon the necessity of extending the time within which suit may be brought. It should be noted that the cause of action existing in the present case and the causes of action arising in similar cases are generally equitable in nature* and involve substantive rights of action which can be enforced against the fiduciary in question in any court in which jurisdiction over him may be obtained. The State of New York in this case has not attempted to affect the character of these substantive rights. Thus, we are not dealing here

* Causes of action against corporate managements and others which are discovered only after independent investigation, are usually equitable in nature because their primary basis is the breach of fiduciary duties.

Resort to equity in cases of this nature has always been considered appropriate and necessary. *Southern Pacific Co. v. Roget*, 250 U. S. 483 (1919); *Russell v. Todd*, 309 U. S. 280 (1940). See also Simpson, *Fifty Years of American Equity* (1936) 59 Harv. L. Rev. 171, 190-191; and *S. E. C. Report, supra*, Note 4, pt. 4, at 694-7, pp. 2, at 22-31.

Whether New York could affect substantive rights arising from transactions not essentially local in character, would present substantial questions of conflicts of law.

with a matter of substantive law.⁸ The New York Statute of Limitations merely involves a determination that, as a matter of state policy, New York will withhold the use of its own courts to enforce certain existing causes of action, assumed to be valid in substance, after the lapse of a fixed period of time, regardless of any equitable considerations to the contrary.

Without questioning the power of an individual state to determine the conditions on which there shall be access to its own courts, such a policy should not be permitted to impose upon the federal courts an obligation to withhold their sanctions in cases where equity clearly compels the granting of such assistance. This conclusion is the more impelled by the fact that the New York statute of limitations, as petitioner construes it, would appear to reflect a state policy at least in part contrary to the policy of the federal government as revealed in the enactment of the various securities and bankruptcy statutes. This national policy has not met with unanimous support in the various states. Some states retain old doc-

⁸ We do not understand petitioner's contention (Br. p. 16 *et seq.*) to be to the contrary. Its argument appears to be that the Statute of Limitations should be treated as a matter of substance because it may be completely dispositive of the case. Petitioner would hardly maintain that if jurisdiction could be obtained over it in some other state there would be no substantive right of recovery against it because of the New York Statute of Limitations.

trines which protect corporate managers and fiduciaries against responsibility to investors and there have been recent statutes which indeed enlarge that immunity. Such state doctrines are not, of course, in direct conflict with the federal statutes, but have taken the form of procedural devices which hamper or limit the effectiveness of recognized substantive rights of investors. Thus, in addition to statutes of limitation such as are involved in the present case,⁹ indemnity provisions have been adopted insuring the payment of directors' expenses in defending themselves against charges of misconduct, or, as in the case of a recent New York law, derivative suits against directors have been prohibited where the security holders bringing suit do not own \$50,000 in mar-

⁹ Although many states have applicable limitation statutes with equitable "discovery" clauses, there are apparently a substantial number which, like New York, make no such provision. See Dawson, *Undiscovered Fraud and Statutes of Limitation* (1933) 31 Mich. L. Rev. 591; Note (1941) *The Statute of Limitations in Suits to Remedy Corporate Abuse*, 41 Col. L. Rev. 686.

As was stated by the court below (143 F. (2d) 503 at 521), Sec. 53 of the New York Civil Practice Act, which provided for a 10-year period of limitations, might have been applicable to this cause of action because of its equitable nature. In this connection, it is interesting to note that subsequent to the institution of the action in this case, the New York Legislature enacted Section 48 (8) of the Civil Practice Act (N. Y. Laws 1942, c. 851) which provided that within 6 years after the cause of action has accrued there must be commenced any action "legal or equitable, by or on behalf of a corporation against a director, officer or stockholder * * * if such

ket value of securities or cannot put up a bond to pay the substantial costs of a directors' defense.¹⁰ In substance, these provisions restrict and in many cases eliminate that protection of investors against misconduct of their corporate fiduciaries which the federal government is seeking to extend. While some of these provisions may not be of permanent significance,¹¹ while they exist they represent a policy at variance with that of the Congress.

To permit the particular New York statute of limitations here involved or other inequitable limitations upon access to state courts to be absolutely controlling would make federal courts of

action is for an accounting, or to procure judgment on the ground of fraud. * * * It has been commented that "this new subdivision materially reduces the period of limitations in many cases. Chiefly affected in this respect are those causes of action not based on fraud in which the remedy sought is purely equitable, to which the ten-year period had previously been applied by the courts. * * *. It now seems clear that, under the new subdivision, the periods of six years, provided for in section 48, and of three years prescribed by reference to section 49, run from the accrual rather than the discovery of the cause of action." Saxe, *New Laws Affecting Practice and Related Matters* (June, 1942), 14 N. Y. State Bar Ass'n Bull. 92, 96-97.

¹⁰ N. Y. Gen. Corp. Law § 61 (a) and (b).

¹¹ In New York, for example, a substantial group in the bar appears to be severely critical of some of these restrictions upon security holders' actions (see Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 322 Calif. L. Rev. 123, at 123, 124 (1944)), and have started a movement for their repeal.

equity blind instruments of a state policy which is contrary to a federal policy upon matters which cannot be regarded as of concern only to the state in which the court is sitting. It would make it possible for the larger financial centers to erect refuges within their borders so that their residents might be protected from the results of their corporate wrongdoing, national in consequences.

Furthermore, to permit such restrictive procedural statutes of states in the forum to limit the rights of residents of other states to litigate in the federal courts would go far to undermine the basis for the establishment of the diversity jurisdiction of those courts. "The provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States, had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts." *Gaiges v. Fuentes*, 92 U. S. 10, at 18-19 (1876). In connection with the historic basis of diversity jurisdiction it has been observed that "The real fear was of state legislatures, not of state courts".¹² Of

¹² Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 Corn. L. Q. 499, 520. See Corwin, *The Progress of Constitutional Theory* (1925) 30 Am. Hist. Rev. 514. See also Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 Harv. L. Rev. 483, 495-497.

course the state legislation then emphasized as potentially dangerous to the rights of non-residents was legislation of states in which the dominant policy might be to place procedural¹³ obstacles in the way of enforcement of the claims of commercial creditors.¹⁴ We do not urge that there was then anticipated the specific possibility

¹³ It is unnecessary to urge that possibly substantive as well as procedural legislation was envisaged. We regard procedural legislation as more closely related to the purposes of diversity jurisdiction, in view of the fact that the possibility of substantive impairment of rights by the individual states was dealt with *inter alia* by the contract clause.

¹⁴ There was a feeling that the federal courts would be "strong courts, creditors' courts, business men's courts." See Friendly, *supra*, n. 12 at 498. "In summary, we may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction, and that as a reason it was by no means without validity." *Id.* at 496-497.

"A . . . powerful influence behind the demand for federal courts was due to the friction between individual states which came to the surface after the danger of the common enemy had disappeared. In one aspect it gave rise to lively suspicions and hostilities by the citizens of one state towards those of another as well as towards aliens. This fear of parochial prejudice, dealing unjustly with litigants from other states and foreign countries, undermined the sense of security necessary for commercial intercourse. Here was a situation which greatly concerned men of business. But mercantile and creditor classes were not crudely seeking to feather their own nests; their devotion to country was enlisted in an effort to fashion instruments of government adequate to secure and promote those individual rights for which independence had been won. One remedy was a system of national courts." Frankfurter and Landis, *The Business of the Supreme Court* (1928) pp. 8-9.

that concern for the interests of corporate management and similar interests might lead some states to impose restrictions upon the assertion of claims by investors scattered throughout the country.

In attempting to protect creditors against procedural devices of state legislation the policy was adopted of granting to the federal courts diversity jurisdiction. In consequence the federal courts were free, save as Congress might otherwise direct, to fashion their own procedure without restrictions imposed by state laws designed to immunize local defendants and the particular businesses in which they engaged, from the enforcement of the valid and subsisting claims of citizens of other states. It is consonant with the policy underlying the creation of diversity jurisdiction for the federal courts exercising that jurisdiction to reject an inequitable application of a local statute of limitations.

In sum, Congress has not imposed a mandate of conformity as to limitations in the present case, and we think that it would tend to subvert rather than subserve relevant Congressional policies if the court felt constrained to apply the procedural bar of the local rule of limitations.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor.

MILTON V. FREEMAN,
Assistant Solicitor.

DAVID K. KADANE,
Special Counsel.

ARNOLD R. GINSBURG,
Attorney,
Securities and Exchange Commission.

JANUARY 1945.

SUPREME COURT OF THE UNITED STATES.

No. 264.—OCTOBER TERM, 1944.

Guaranty Trust Company of New York, Petitioner,	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
vs.	
Grace W. York.	

[June 18, 1945.]

Mr. Justice FRANKFURTER delivered the opinion of the Court:

In *Russell v. Todd*, 309 U. S. 280, 294, we had "no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies." The question thus carefully left open in *Russell v. Todd* is now before us. It arises under the following circumstances.

In May, 1930, Van Sweringen Corporation issued notes to the amount of \$30,000,000. Under an indenture of the same date, petitioner, Guaranty Trust Co., was named trustee with power and obligations to enforce the rights of the noteholders in the assets of the Corporation and of the Van Sweringen brothers. In October, 1930, petitioner, with other banks, made large advances to companies affiliated with the Corporation and wholly controlled by the Van Sweringens. In October, 1931, when it was apparent that the Corporation could not meet its obligations, Guaranty co-operated in a plan for the purchase of the outstanding notes on the basis of cash for 50% of the face value of the notes and twenty shares of Van Sweringen Corporation's stock for each \$1,000 note. This exchange offer remained open until December 15, 1931.

Respondent York received \$6,000 of the notes as a gift in 1934, her donor not having accepted the offer of exchange. In April, 1940, three accepting noteholders began suit against petitioner, charging fraud and misrepresentation. Respondent's application to intervene in that suit was denied, 117 F. 2d 95, and summary judgment in favor of Guaranty was affirmed. *Hackner v. Morgan*, 130 F. 2d 300. After her dismissal from the *Hackner* litigation, respondent, on January 22, 1942, began the present proceedings.

The suit, instituted as a class action on behalf of non-accepting noteholders and brought in a federal court solely because of diversity of citizenship, is based on an alleged breach of trust by Guaranty in that it failed to protect the interests of the noteholders in assenting to the exchange offer and failed to disclose its self-interest when sponsoring the offer. Petitioner moved for summary judgment, which was granted, upon the authority of the *Hackner* case. On appeal, the Circuit Court of Appeals, one Judge dissenting, found that the *Hackner* decision did not foreclose this suit, and held that in a suit brought on the equity side of a federal district court that court is not required to apply the State statute of limitations that would govern like suits in the courts of a State where the federal court is sitting even though the exclusive basis of federal jurisdiction is diversity of citizenship. 143 F. 2d 503. The importance of the question for the disposition of litigation in the federal courts led us to bring the case here. 323 U. S. 693.

In view of the basis of the decision below, it is not for us to consider whether the New York statute would actually bar this suit were it brought in a State court. Our only concern is with the holding that the federal courts in a suit like this are not bound by local law.

We put to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicating a claim based on a federal law. See, for instance, *Board of Comm'rs v. U. S.*, 308 U. S. 343; *Deitrick v. Greaney*, 309 U. S. 190; *D'Oench, Dahme & Co. v. F. B. I. C.*, 315 U. S. 447; *Clearfield Trust Co. v. U. S.*, 318 U. S. 363; *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d 539. Our problem only touches transactions for which rights and obligations are created by one of the States, and for the assertion of which, in case of diversity of the citizenship of the parties, Congress has made a federal court another available forum.

Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins*, 304 U. S. 64, embodies. In overruling *Swift v. Tyson*, 16 Pet. 1, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. See, e. g., Field, J., dissenting in *B. & O. Railroad v. Baugh*, 149 U. S. 368, 391; Holmes, J., dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370, and in

B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U. S. 518, 532; *Erie R. Co. v. Tompkins*, *supra* at 73, note 6. Law was conceived as a "brooding omnipresence" of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was "between Citizens of different States" under Art. III, § 2 of the Constitution of the United States.

This impulse to freedom from the rules that controlled State courts regarding State-created rights was so strongly rooted in the prevailing views concerning the nature of law, that the federal courts almost imperceptibly were led to mutilating construction even of the explicit command given to them by Congress to apply State law in cases purporting to enforce the law of a State. See § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92. The matter was fairly summarized by the statement that "During the period when *Swift v. Tyson* (1842-1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law." *Vanderbark v. Owens, Illinois Co.*, 311 U. S. 538, 540.

In relation to the problem now here, the real significance of *Swift v. Tyson* lies in the fact that it did not enunciate novel doctrine. Nor was it restricted to its particular situation. It summed up prior attitudes and expressions in cases that had come before this Court and lower federal courts for at least thirty years, at law as well as in equity.¹ The short of it is that the doctrine was congenial to the jurisprudential climate of the time.

¹In *Russell v. Southard*, 12 How. 139, 147, Mr. Justice Curtis, refusing to be bound by Kentucky law harring the reception of oral evidence to show that an absolute bill of sale was in reality a mortgage, declared that "upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles." To support this statement, he cited, among others, *Robinson v. Campbell*, 3 Wheat. 212, *Boyle v. Zacharie* and *Turner*, 6 Pet. 648, and *Swift v. Tyson*, *supra*. This commingling of law and equity cases indicates that the same views governed both and that *Swift v. Tyson* was merely another expression of the ideas put forth in the equity cases.

Once established, judicial momentum kept it going. Since it was conceived that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute", 276 U. S. 518, 532, 533, State court decisions were not "the law" but merely someone's opinion—to be sure an opinion to be respected—concerning the content of this all-pervading law. Not unnaturally, the federal courts assumed power to find for themselves the content of such a body of law. The notion was stimulated by the attractive vision of a uniform body of federal law. To such sentiments for uniformity of decision and freedom from diversity in State law the federal courts gave currency, particularly in cases where equitable remedies were sought, because equitable doctrines are so often cast in terms of universal applicability when close analysis of the source of legal enforceability is not demanded.

In exercising their jurisdiction on the ground of diversity of citizenship, the federal courts, in the long course of their history, have not differentiated in their regard for State law between actions at law and suits in equity. Although § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92, 28 U. S. C. § 725, directed that the "laws of the several states . . . shall be regarded as rules of decision in trials of common law . . .", this was deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts and therefore was equally applicable to equity suits.² See *Hawkins v. Barney's Lessee*, 5 Pet. 457, 464; *Mason v. United States*, 260 U. S. 545, 559; *Erie R. Co. v. Tompkins*, *supra* at 72. Indeed, it may fairly be said that the federal courts gave greater respect to State-created "substantive rights", *Pusey & Jones Co. v. Hansen*, 261 U. S. 491, 498, in equity than they gave them on the law side, because rights at law were usually declared by State courts and as such increasingly flouted by extension of the doctrine of *Swift v. Tyson*.

²In *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 525, Chief Justice Marshall, in discussing the applicability of Ohio occupant law as "rules of decision" under § 34, said, "The laws of the states, and the occupant law, like others, would be so regarded independent of that special enactment. . . . It is interesting to note that this judicial pronouncement corresponds to the views John Marshall expressed in the Virginia Convention called to ratify the Constitution. Responding to George Mason's question as to what law would apply in the federal courts in diversity cases, Marshall declared: "By the laws of which state will it be determined?" said he. "By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this commonwealth." 3 Elliott's Debates, 556.

while rights in equity were frequently defined by legislative enactment and as such known and respected by the federal courts. See, e. g., *Clark v. Smith*, 13 Pet. 195; *Scott & Neely*, 140 U. S. 106; *Louis & Nash R. R. v. West Un. Tel. Co.*, 234 U. S. 369, 374-76; *Pusey & Jones Co. v. Hanssen*, *supra* at 498.

Partly because the States in the early days varied greatly in the manner in which equitable relief was afforded and in the extent to which it was available, see, e. g., Fisher, *The Administration of Equity Through Common Law Forms* (1885) 1 L. Q. Rev. 455; Woodruff, *Chancery in Massachusetts* (1889) 5 L. Q. Rev. 370; Laussat, *Essay on Equity in Pennsylvania* (1826), Congress provided that "the forms and modes of proceedings in suits of equity" would conform to the settled uses of courts of equity. Section 2, 1 Stat. 275, 276, 28 U. S. C. § 723. But this enactment gave the federal courts no power that they would not have had in any event when courts were given "cognizance" by the first Judiciary Act of suits "in equity". From the beginning there has been a good deal of talk in the cases that federal equity is a separate legal system. And so it is, properly understood. The suits in equity of which the federal courts have had "cognizance" ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery. But this system of equity, "derived its doctrines, as well as its powers, from its mode of giving relief". Langdell, *Summary of Equity Pleading* (1877) xxviii. In giving federal courts "cognizance" of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.

This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, *Payne v. Hook*, 7 Wall. 425, 430; *Atlas Ins. Co. v. Southern, Inc.*, 306 U. S. 563, 568; *Sprague v. Ticonic Bank*, 307 U. S. 161, 164-165; a plain, adequate and complete remedy at law must be wanting, § 16, 1 Stat. 73, 82, 28 U. S. C. § 384; explicit Congressional curtailment of equity powers

must be respected, see, *e. g.*, *Norris-LaGuardia Act*, 47 Stat. 70-29 U. S. C. § 101 *et seq.*; the constitutional right to trial by jury cannot be evaded, *Whitehead v. Shattuck*, 138 U. S. 146. That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts. See *Clark v. Smith*, *supra* at 203; *Broderick's Will*, 21 Wall. 503, 519-20; *Louis. & Nash R. R. Co. v. West. Un. Tel. Co.*, *supra* at 376; *Henrietta Mills v. Rutherford Co.*, 281 U. S. 121, 127-28; *Atlas Ins. Co. v. Southern, Inc.*, *supra* at 568-70. State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts.³ Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it. Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforce-

³ In *Pusey & Jones Co. v. Hanssen*, *supra*, the Court had to decide whether a Delaware statute had created a new right appropriate for enforcement in accordance with traditional equity practice or whether the statute had merely given the Delaware Chancery Court a new kind of remedy. The statute authorized the Chancellor to appoint a receiver for an insolvent corporation upon the application of an unsecured simple contract creditor. Suit was brought in a federal equity court under diversity jurisdiction. Although traditional equity notions do not give a simple contract creditor an interest in the funds of an insolvent debtor, the State may, as this Court recognized, create such an interest. When the State has done that, whatever remedies are consonant with the practice of equity courts in effectuating creditor's rights come into play. *Pusey & Jones Co. v. Hanssen*, *supra*, did not question that in the case of diversity jurisdiction the States create the obligation for which relief is sought. But the Court construed the Delaware statute merely to extend the power to an equity court to appoint a receiver on the application of an ordinary contract creditor. By conferring new discretionary authority upon its equity court, Delaware could not modify the traditional equity rule in the federal courts that only someone with a defined interest in the estate of an insolvent person, *e. g.*, a judgment creditor, can protect that interest through receivership. But the Court recognized that if the Delaware statute had been one not regulating the powers of the Chancery Court of Delaware but creating a new interest in a contract creditor, the federal court would have had power to grant a receivership at the behest of such a simple contract creditor, as much so as in the case of a secured creditor. See *Mackenzie Oil Co. v. Omar Oil & Gas Co.*, 14 Del. Ch. 36, 45, for Delaware's view as to the nature of the Delaware statute.

ing rights created by the States and not arising under any inherent or statutory federal law.⁴

Inevitably, therefore, the principle of *Eric R. Co. v. Tompkins*, an action at law, was promptly applied to a suit in equity. *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202.

And so this case reduces itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties. Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity when that court's jurisdiction is dependent on the fact that there is a State-created right, or is such statute of "a mere remedial character"? *Henrietta Mills v. Rutherford Co.*, *supra* at 128, which a federal court may disregard?

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See *Home Ins. Co. v. Dick*, 281 U. S. 397, 409. And the different problems are only distantly related, at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post facto* legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, e. g., *Amer. Ry. Exp. Co. v. Lerco*, 263 U. S. 19, 21; *Davis v. Wechsler*, 263

⁴ "It is true that where a state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction. . . . But the enforcement in the Federal courts of new equitable rights created by States is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Whatever uncertainty may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights." *Henrietta Mills v. Rutherford Co.*, *supra* at 127-128.

U. S. 22, 24-25; *Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60; *Garrett v. Moore-McCormack Co.*, 317 U. S. 339, 248-49; and see Tunks, *Categorization and Federalism: "Substance" and "Procedure"* After *Erie Railroad v. Tompkins* (1939) 34 Ill. L. Rev. 271, 274-276; Cook, *Logical and Legal Bases of Conflict of Laws* (1942) 163-165.

Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, ~~only~~ another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced; or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely: does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a

block away should not lead to a substantially different result. And so, putting to one side abstractions regarding "substance" and "procedure", we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Service Co. v. Dunlap*, 308 U. S. 208, as to conflict of laws, *Klaxon Co. v. Stentor Co.*, 313 U. S. 457, as to contributory negligence, *Palmer v. Hoffman*, 318 U. S. 109, 117. *Eric R. Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944) 58 Harv. L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there.⁵ Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery.

Prior to *Eric R. Co. v. Tompkins* it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature of jurisdiction of the federal courts in diversity cases. But even before *Eric R. Co. v. Tompkins*, federal courts relied on statutes of limitations of the States in which they sat. In suits at law State limitations statutes were held to be "rules of decision" within § 34 of the Judiciary Act of 1789 and as such applied in "trials at common law": *McCluny v. Sullivan*, 3 Pet. 270; *Bank of Alabama v. Dalton*, 9 How. 522;

⁵ See, e. g., *Hubert v. Clark*, 128 N. Y. 295; *House v. Carr*, 185 N. Y. 453; *Lightfoot v. Davis*, 198 N. Y. 261; *Davidson v. Whitthaus*, 106 App. Div. 182; *Matter of Ewald*, 174 Misc. 939. The statute may be waived, *Peoples Trust Co. v. O'Neil*, 273 N. Y. 312, 316, and must be pleaded, *Dunkum v. Cook Building Corp.*, 227 App. Div. 230.

And see *Dampson v. Channell*, 110 F. 2d 754.

Leffingwell v. Warren, 2 Black 599; *Bauserman v. Blunt*, 147 U. S. 647. While there was talk of freedom of equity from such State statutes of limitations, the cases generally refused recovery where suit was barred in a like situation in the State courts, even if only by way of analogy. See, e.g., *Godden v. Kimmell*, 99 U. S. 201; *Alsop v. Riker*, 155 U. S. 448; *Benedict v. City of New York*, 250 U. S. 321, 327-328. However in *Kirby v. Lake Shore & M. S. Co.*, 120 U. S. 130, the Court disregarded a State statute of limitations where the Court deemed it inequitable to apply it.

To make an exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision. Judge Augustus N. Hand thus summarized below the fatal objection to such inroad upon *Erie R. Co. v. Tompkins*: "In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws. The main foundation for the criticism of *Swift v. Tyson* was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts." 143 F. 2d 503, 529, 531.

Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained "apprehensions" lest distant suitors be subjected to local bias in State courts, or, at least, viewed with "indulgence the possible fears and apprehensions" of such suitors. *Bank of the United States v. DeCaux*, 5 Cranch 61, 87. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to

govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.

Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But insofar as these general observations go beyond that, they merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin. And so, before the true source of law that is applied by the federal courts under diversity jurisdiction was fully explored, some things were said that would not now be said. But nothing that was decided, unless it be the *Kirby* case, needs to be rejected.

The judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice ROBERTS and Mr. Justice DOUGLASS took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE.

I dissent. If the policy of judicial conservatism were to be followed in this case, which forbids deciding constitutional and other important questions hypothetically or prematurely, I would favor remanding the cause to the Court of Appeals for determination of the narrow and comparatively minor question whether, under the applicable local law, the cause of action has been barred by lapse of time. That question has not been decided, *only* be determined in respondent's favor, and in that event the important question affecting federal judicial power now resolved, in a manner contrary to all prior decision here, will have been determined without substantial ultimate effect upon the litigation.²

¹ The Court of Appeals only assumed *arguendo* that the local statute of limitations had terminated the right to sue. 143 F. 2d 503.

² An inferior court, of course, is free to select one or more of several available grounds upon which to rest its decision; and generally, on review here, our function should be performed by passing upon the grounds chosen. But there are circumstances in which it is proper to vacate the judgment and remand the cause for consideration of other issues presented. Cf. e.g., the recent instance of *Herb v. Pitcairn*, 324 U. S. 117; 324 U. S. —.

But the Court conceives itself confronted with the necessity for making that determination and in doing so overturns a rule of decision which has prevailed in the federal courts from almost the beginning. I am unable to assent to that decision, for reasons stated by the Court of Appeals³ and others to be mentioned only briefly. One may give full adherence to the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, and its extension to cases in equity in so far as they affect clearly substantive rights, without conceding or assuming that the long tradition, both federal and state, which regards statutes of limitations as falling within the category of remedial rather than substantive law, necessarily must be ruled in the same way; and without conceding further that only a different jurisprudential climate or a kind of "brooding omnipresence in the sky" has dictated the hitherto unvaried policy of the federal courts in their general attitude toward the strict application of local statutes of limitations in equity causes.

If any characteristic of equity jurisprudence has descended unbrokenly from and within "the traditional scope of equity as historically evolved in the English Court of Chancery," it is that statutes of limitations, often in terms applying only to actions at law, have never been deemed to be rigidly applicable as absolute barriers to suits in equity as they are to actions at law.⁴ That tradition, it would seem, should be regarded as having been incorporated in the various Acts of Congress which have conferred equity jurisdiction upon the federal courts. So incorporated, it has been reaffirmed repeatedly by the decisions of this and other courts.⁵ It is now excised from those Acts. If there is to be excision, Congress, not this Court, should make it.

Moreover, the decision of today does not in so many words rule that Congress could not authorize the federal courts to administer equitable relief in accordance with the substantive rights of the parties, notwithstanding state courts had been forbidden by local statutes of limitations to do so. Nevertheless the implication to that effect seems strong; in view of the reliance upon

³ 143 F. 2d 503. The court's opinion reviews at length the unbroken course of decision now overturned.

⁴ *Michoud v. Girod*, 4 How. 504, 561; *Meador v. Norton*, 11 Wall. 2442; *Bailey v. Glover*, 21 Wall. 342, 348; *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 120.

⁵ See the authorities cited and discussed; 143 F. 2d 503, 522-524. See also *Committee for Holders, etc. v. Kent*, 143 F. 2d 684, 687; *Overfield v. Pizzo*, 146 F. 2d 889, 901, 921-923.

Erie R. Co. v. Tompkins.⁶ In any event, the question looms more largely in the issues than the Court's opinion appears to make it. For if legislative acquiescence in long-established judicial construction can make it part of a statute, it has done so in this instance. More is at stake in the implications of the decision, if not in the words of the opinion, than simply bringing federal and local law into accord upon matters clearly and exclusively within the constitutional power of the state to determine. It is one thing to require that kind of an accord in diversity cases when the question is merely whether the federal court must follow the law of the state as to burden of proof, *Cities Service Co. v. Dunlap*, 308 U. S. 208; contributory negligence, *Hoffman v. Palmer*, 318 U. S. 109, 117; or perhaps in application of the so-called parol evidence rule. These ordinarily involve matters of substantive law, though nominated in terms of procedure. But in some instances their application may lie along the border between procedure or remedy and substance, where the one may or may not be in fact but another name for the other. It is exactly in this borderland, where procedural or remedial rights may or may not have the effect of determining the substantive ones completely, that caution is required in extending the rule of the *Erie* case by the very rule itself.

The words "substantive" and "procedural" or "remedial" are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance. But they have come to designate in a broad way large and distinctive legal domains within the greater one of the law and to mark, though often indistinctly or with overlapping limits, many divides between such regions.

One of these historically has been the divide between the substantive law and the procedural or remedial law to be applied by the federal courts in diversity cases, a division sharpened but not wiped out by *Erie R. Co. v. Tompkins* and subsequent decisions extending the scope of its ruling. The large division between adjective law and substantive law still remains, to divide the power of Congress from that of the states and consequently

⁶ In the *Erie* case the Court said: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so long applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." 304 U. S. 64, 77-78.

2. to determine the power of the federal courts to apply federal law or state law in diversity matters.

This division, like others drawn by the broad allocation of adjective or remedial and substantive, has areas of admixture of these two aspects of the law. In these areas whether a particular situation or issue presents one aspect or the other depends upon how one looks at the matter. As form cannot always be separated from substance in a work of art, so adjective or remedial aspects cannot be parted entirely from substantive ones in these borderland regions.

Whenever this integration or admixture prevails in a substantial measure, so that a clean break cannot be made, there is danger either of nullifying the power of Congress to control not only how the federal courts may act, but what they may do by way of affording remedies, or of usurping that function, if the *Eric* doctrine is to be expanded judicially to include such situations to the utmost extent.

It may be true that if the matter were wholly fresh the barring of rights in equity by statutes of limitation would seem to partake more of the substantive than of the remedial phase of law. But the matter is not fresh and it is not without room for debate. A long tradition, in the states and here, as well as in the common law which antedated both state and federal law, has emphasized the remedial character of statutes of limitations, more especially in application to equity causes, on many kinds of issues requiring differentiation of such matters from more clearly and exclusively substantive ones. We have recently reaffirmed the distinction in relation to the power of a state to change its laws with retroactive effect, giving renewed vigor if not new life to *Campbell v. Holt*, 115 U. S. 620. *Chase Securities Corp. v. Donaldson*, No. 110, decided May 21, 1945. Similar, though of course not identical, arguments were advanced in that case to bring about departure from the long-established rule, but without success. The tradition now in question is equally long and unvaried. I cannot say the tradition is clearly wrong in this case more than in that. Nor can I say, as was said in the *Eric* case, that the matter is beyond the power of Congress to control. If that be conceded, I think Congress should make the change if it is to be made. The *Eric* decision was rendered in 1938. Seven years have passed without action by Congress to extend the rule to these matters. That is long enough to justify the conclusion that Congress also

regards them as not governed by *Erie* and as wishing to make no change. This should be reason enough for leaving the matter at rest until it decides to act.

Finally, this case arises from what are in fact if not in law interstate transactions.⁷ It involves the rights of security holders in relation to securities which were distributed not in New York or Ohio alone but widely throughout the country. They are the kind of rights which Congress acted to safeguard when it adopted the Securities and Exchange legislation.⁸ Specific provisions of that legislation are not involved in this litigation. The broad policies underlying it may be involved or affected, namely, by the existence of adequate federal remedies, whether judicial or legislative, for the protection of security holders against the misconduct of issuers or against the breach of rights by trustees. Even though the basic rights may be controlled by state law, in such situations the question is often a difficult one whether the law of one state or another applies, and this is true not only of rights clearly substantive but also of those variously characterized as procedural or remedial and substantive which involve the application of statutes of limitations.

Applicable statutes of limitations in state tribunals are not always the ones which would apply if suit were instituted in the courts of the state which creates the substantive rights for which enforcement is sought. The state of the forum is free to apply its own period of limitations, regardless of whether the state originating the right has barred suit upon it.⁹ Whether or not the action will be held to be barred depends therefore not upon the law of the state which creates the substantive right, but upon the law of the state where suit may be brought. This in turn will depend upon where it may be possible to secure service of process.

⁷ Reference is made to the opinion of the Court of Appeals for a detailed statement of the nature and scope of the intricate and elaborate financial transactions involving the distribution of \$30,000,000 worth of securities, apparently in many states, including Ohio and New York, and rights growing out of the distribution. 143 F. 2d at 505 *et seq.* See also *Eastman v. Morgan*, 43 F. Supp. 637, *aff'd sub nom. Hickner v. Morgan*, 139 F. 2d 300, cert. denied, 317 U. S. 691.

⁸ Cf. S. Rep. No. 774, 77th Cong., 1st Sess., Additional Report of Committee on Interstate Commerce pursuant to S. Res. 71, 74th Cong., pts. 14. See also *Stock Exchange Practices*, Hearings before Committee on Banking and Currency on S. Res. 84, 72d Cong., and S. Res. 56 and 97, 73d Cong.

⁹ 43 Beale, *Conflict of Laws* (1935 ed.) 1620, 1621; Goodrich, *Conflict of Laws* (1938 ed.) 201, 202.

and thus jurisdiction of the person of the defendant. It may be therefore that because of the plaintiff's inability to find the defendant in the jurisdiction which creates his substantive right, he will be foreclosed of remedy by the sheer necessity of going to the haven of refuge within which the defendant confines its "presence" for jurisdictional purposes. The law of the latter may bar the suit even though suit still would be allowed under the law of the state creating the substantive right.

It is not clear whether today's decision puts it into the power of corporate trustees, by confining their jurisdictional "presence" to states which allow their courts to give equitable remedies only within short periods of time, to defeat the purpose and intent of the law of the state creating the substantive right. If so, the "right" remains alive, with full-fledged remedy by the law of its origin, and because enforcement must be had in another state, which affords refuge against it, the remedy and with it the right are nullified. I doubt that the Constitution of the United States requires this or that the Judiciary Acts permit it. A good case can be made, indeed has been made, that the diversity jurisdiction was created to afford protection against exactly this sort of nullifying state legislation.¹⁰

In my judgment this furnishes added reason for leaving any change, if one is to be made, to the judgment of Congress. The next step may well be to say that in applying the doctrine of laches a federal court must surrender its own judgment and attempt to find out what a state court sitting a block away would do with that notoriously amorphous doctrine.

Mr. Justice MURPHY joins in this opinion.

¹⁰ Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 *Corn. L. Q.* 499, 520. See Corwin, *The Progress of Constitutional Theory* (1927) 30 *Am. Hist. Rev.* 511, 514. See also Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 *Harv. L. Rev.* 483, 495-497. That the motivating desire was or may have been to protect creditors who were men of business does not make the policy less applicable when the creditor is a customer of such men.